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Supreme Court, U.S.
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In The Supreme Court of the United States

ANGEL WATKINS,
Petitioner,

v.

PROFESSIONAL SECURITY BUREAU,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the affirmative defense to a claim of hostile work environment, as described by this Court in Burlington Industries v. Ellerth, available when the alleged hostile work environment has resulted in a "tangible" employment action against the plaintiff employee, even if not specifically pled?

2. When the affirmative defense to a hostile work environment claim is available, can the defense be applied to defeat a hostile work environment claim even if the employee properly took advantage of preventive or corrective opportunities provided by the employer, thus removing the second element of the defense?

3. In a claim under Title VII of employment retaliation for engaging in protected conduct, what evidence must a plaintiff present to defeat the employer's contention that plaintiff's termination was based on a nonretaliatory reason related to job performance, for purposes of overturning a jury verdict in favor of plaintiff and granting judgment to the employer?

4. Under standards articulated by this Court in its recent Opinion of Kolstad v. American Dental Association, can punitive damages in a claim under Title VII be imposed upon an employer for failing to properly investigate and correct sexual harassment or hostile work environment situations and when a manager's sexual harassment conduct was especially egregious, assuming that the employer had a sexual harassment policy?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the Petitioner is:

Angel Watkins.

Including the parties named in the caption of this Petition, the Respondent is:

Professional Security Bureau, Limited.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1999

ANGEL WATKINS

Petitioner,

v.

PROFESSIONAL SECURITY BUREAU,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Angel Watkins, by her counsel ("Petitioner" or "Appellant"), and proceeding under applicable Rules of this Court, respectfully requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland are in the form of a bench ruling on September 4, 1998, granting Respondent's motion for judgment on punitive damages (Appendix B) and a memorandum opinion of October 22, 1998, granting Respondent's motion for judgment as a matter of law, or for new trial. (Appendix C and D). Both opinions are unreported.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the District Court, was issued November

15, 1999. The per curiam opinion is unreported but may be found at 1999 WL 1032614.

STATEMENT OF JURISDICTION

This was an action alleging, among other things, hostile work environment and unlawful adverse employment action (termination) in retaliation for protected activity (reporting sexual harassment conduct), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The alleged discrimination was committed in Maryland. Jurisdiction of the District Court was invoked under 28 U.S.C. 1343(4).

Petitioner filed her claim of sex discrimination, harassment and retaliation with the Equal Employment Opportunity Commission on or about September 18, 1996 and on or about November 10, 1996. She received her Notice of Right to Sue, dated December 17, 1996. Her complaint in the District Court was filed on or about February 20, 1997.

On September 3, 1998, the jury returned a verdict in Petitioner's favor, awarding compensatory damages. The District Court then conducted a hearing on Respondent's motion for judgment on punitive damages, granting the motion. An Order of Judgment was entered September 4, 1998.

Respondent then timely moved for judgment as a matter of law or for a new trial, on the merits. Petitioner responded. By Memorandum Opinion and Order dated October 22, 1998, the District Court granted the motion, thus overturning the verdict.

Petitioner filed a timely amended notice of appeal on November 16, 1998. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was invoked under 28 U.S.C. §1291 and under Rule 50(c). Under Rule 50, an appellate court may review a trial court's grant of judgment notwithstanding verdict or in the alternative a new trial, since in such instances the trial court's decision is deemed final.

On November 15, 1999, the Fourth Circuit issued its per curiam opinion affirming the District Court. This Petition is being submitted within 90 days of the Fourth Circuit's Opinion. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Hostile work environment:

42 U.S.C. §2000e-2(a)(1) (Section 703 of Title VII)--it is an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's....sex."

Retaliatory discharge:

42 U.S.C. §2000e-3(a)--it is an unlawful employment practice "for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under this title."

Punitive damages:

42 U.S.C. §1981a(b)--a complaining party "may recover punitive damages under this section against a respondent" if the complaining party demonstrates the respondent engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

STATEMENT OF THE CASE

A. Procedural Background

Petitioner's employer was Respondent Professional Security Bureau, Ltd. ("PSB" or "Respondent"). Petitioner's Complaint sought declaratory and injunctive relief, reinstatement with back pay, compensatory damages, punitive damages (no figure was stated for compensatory or punitive damages), in

addition to attorney fees, interest, and costs. Petitioner also sought a jury trial. (Appendix A). The Complaint was answered on or about April 21, 1997.

Trial in the District Court (Maletz, J.) began on August 31, 1998 and continued to September 3, 1998. The matter proceeded to the jury on compensatory damages only. On September 3, 1998, the jury returned a verdict for Petitioner in the amount of $63,222: $3,222 direct damages and $60,000 non-economic damages.

The issue of punitive damages was heard by the Court (Maletz, J.) on September 4, 1998. The Court granted PSB's motion for judgment, determining that punitive damages would not be submitted to the jury. This ruling concluded all claims. The District Court entered judgment for Petitioner for $63,222.

On or about September 11, 1998, PSB submitted another motion for judgment or for new trial. Appellant responded on September 23, 1998. To preserve appeal rights, Petitioner submitted a notice of appeal regarding the District Court's September 4 judgment, on October 2, 1998.

On October 22, 1998, the District Court (Maletz, J.), acting without a hearing, issued a memorandum and order granting PSB's motion for judgment or for new trial. On November 17, 1998, Petitioner submitted an amended notice of appeal.

On November 15, 1999, the Fourth Circuit affirmed the District Court. Affirmance was by per curiam decision.

B. Statement of Relevant Facts

Professional Security Bureau, Ltd. is a corporation operating a security business and providing security guards for various corporate clients on the East Coast. Its clients are located in New Jersey, New York, Pennsylvania, Maryland, and Virginia. It has about 3,000 employees, with about 50 in Maryland.

Petitioner Angel Watkins was a security guard with PSB in Maryland. She started in August of 1995. She is a single mother and has had to maintain employment to support herself and her children, to the point of going back to work within days of having her second child.

The company maintained at trial that it provides sexual harassment training for its employees. However, Ms. Watkins testified that she was hired almost immediately after she turned in her application and that she received little or no formal training from PSB on sexual harassment or other employment areas. There was testimony that PSB has a sexual harassment policy, also addressed in an employee handbook. However, Ms. Watkins stated that she never received any employee handbook or other documentation concerning any company policy regarding sexual harassment or employment discrimination.

Ms. Watkins' supervisor was Donald Nicola. His supervisor, in turn, was Edward Kelley, Director of Security, who had been with the company since 1985, and was the branch manager for the region that encompassed New Jersey, New York, Pennsylvania and Maryland. Thus, Mr. Kelley had company authority over Ms. Watkins, her co-workers or supervisors, and Mr. Nicola. The company's vice president for operations at the time was Charles Fisher.

From August, 1995 to December 1995, Ms. Watkins had no difficulties in her job. Her performance was satisfactory and she was not subject to disciplinary actions. As noted, she even returned to work a week after having her second child on January 7, 1996. She was a valuable worker, and was one of Mr. Nicola's favorite employees. He called her "my little angel."

Petitioner acknowledges that during her security post at Bennett House, a local retirement home, she experienced some difficulty managing child care and her job duties. But she never

abandoned her post. On one occasion, Mr. Nicola told her that he would spell her at her post, so she could pick up her children. He also told her that she should come to work and report to her post even if it meant bringing her children along.

However, Mr. Kelley, learning of that situation, left a message with Ms. Watkins to come to the Lutherville office to see him. She did so, meeting with Mr. Kelley at 7 a.m. on May 24, 1996. She was without her uniform because she only had one, and she had not had a chance to get it washed. She was wearing a skirt and a blouse. He was behind his desk. Mr. Kelley discussed Ms. Watkins' baby sitter problem and why she did not have her uniform.

Then, Mr. Kelley became abusive. He called Ms. Watkins stupid and dumb and an unfit mother. She told Mr. Kelley that she did not "abandon" her post. Ms. Watkins got up to leave. But Mr. Kelley came from behind his desk and shoved her into the conference room. There, he pinned her to the wall and forced her to have sexual intercourse with him. She tried to push him off, but he was too strong. Ms. Watkins protested and told Mr. Kelley to stop, but he told her to shut up.

At that moment, there was a noise as if someone was in the hallway. Mr. Kelley zipped up his pants and went to see what the noise was. Ms. Watkins saw her chance to leave the room quickly, and did so. The incident lasted about a half an hour. After she got home, she got a call from the office making sure she would be at work the next day.

Ms. Watkins testified that she talked to her doctor about the incident in May, 1996. She contacted police in August, 1996. A report was filed (Police Report 96-262-1890, filed with the Baltimore County Police Department). However, no charges were brought against Mr. Kelley. Ms. Watkins also later talked to Marilyn Jackson, of the human resources department at PSB.

However, from May, 1996 to August, 1996, about three months, Ms. Watkins did not say anything to anyone at PSB the incident. In August of 1996, she was meeting with Hazel Dowling, a site supervisor, to do training on a new job site. At that time, she revealed to Ms. Dowling what Mr. Kelley had done to her in May. Ms. Watkins was too embarrassed to reveal all of the details and Ms. Dowling did not want to hear all the details, so Ms. Watkins stopped the story at saying that Mr. Kelley had fondled her under her clothing.

Ms. Dowling reported the story to Mr. Nicola. Mr. Nicola said he would investigate. The next day, he came to Ms. Watkins' post at Bennett House to interview her about the incident. Ms. Watkins repeated the incident as she revealed it to Ms. Dowling. Mr. Nicola said he would investigate further, and told her not to speak to anyone else at PSB about it. However, neither Ms. Dowling nor Ms. Watkins heard anything more about any other investigation which may have been conducted by Mr. Nicola or by anyone else at PSB.

Mr. Nicola said Ms. Dowling told him that Ms. Watkins did not want to pursue any charges, and that Ms. Watkins had confirmed this in his discussion of the incident with her. Ms. Watkins denies this. Mr. Nicola also said he made a report about the incident to Mr. Fisher, vice president for operations, and that Mr. Fisher told Mr. Nicola that he would follow up on it. But Mr. Nicola did not hear anything more about it from Mr. Fisher.

Mr. Fisher apparently took no action because Mr. Nicola said Ms. Watkins did not want to pursue the matter, and because Mr. Kelley would be leaving the company, in any event. Yet, in August of 1996, Mr. Kelley was out on disability due to injuries he sustained in an auto accident, having not yet been relieved.

Mr. Fisher acknowledged that he never met with Ms. Watkins about the incident. Mr. Fisher had a phone conversation

with Mr. Kelley about it, in which Mr. Kelley denied the incident. Mr. Fisher testified that he told Mr. Kelley not to have any further contact with Ms. Watkins. Mr. Fisher also said Ms. Watkins did not contact the company human resources department about the incident, although Ms. Watkins testified otherwise. These exchanges appeared to have settled the matter, as far as Mr. Fisher and the company was concerned.

Also in August, 1996, during her job post at Bennett House, Ms. Watkins had locked keys in a lounge when she left that area to assist a resident. She called the building manager who said Ms. Watkins could see the custodian and get a master key to retrieve the keys she locked in the room. Ms. Watkins did so, but the custodian did not have a master key. Ms. Watkins contacted the building manager and other security, and was informed that the situation was not serious, she could go home if her security post time was up, and she could retrieve the keys the next day. However, apparently Bennett House management was upset about the incident and PSB eventually lost the account.

On September 16, 1996, after the Bennett House situation--and, not coincidentally, only about three weeks after Ms. Watkins reported the incident involving Mr. Kelley to Ms. Dowling and to Mr. Nicola--Ms. Watkins was called by Mr. Nicola to a meeting in Mr. Kelley's PSB office. At the meeting was Mr. Nicola, Mr. Kelley, and another co-worker.

Mr. Kelley asked Ms. Watkins about her leaving her post. He told her he had bent over backwards to save her job but she was still "messing up." Mr. Nicola said nothing. Ms. Watkins stood up to leave. But Mr. Kelley told her the meeting was not over and to sit down. He told her he was going to fire her. Ms. Watkins responded that she did not owe him any favors and was tired of his taking advantage of her. She said she was going to get a lawyer and was going to report the sexual harassment and

rape incident to the EEOC. Mr. Kelley told her to get the hell out of his office.

Mr. Nicola later called Ms. Watkins and told her to bring in her uniform because she was terminated. She did so the next day, and asked for a copy of her work record. She testified that, at that time, she was not informed of the reason for her termination.

Ms. Watkins had to take a job with a maid service to supplement her income. She continued to work as a clerk for the post office, as she had done since July, 1996. She estimated her total economic pay loss since her termination from PSB at $5,000 to $7,000 annually. She also became upset, depressed, and suicidal. She experienced psychological stress, loss of appetite, inability to hold a relationship, and loss of sleep.

Further, when Ms. Watkins told Ms. Dowling about the incident, Ms. Dowling told her this was not the only person at PSB who had been the target of unwanted sexual advances by Mr. Kelley. Another employee, Kia Odom, had been harassed by him, apparently in a similar fashion. Mr. Nicola was aware of this. Ms. Watkins believed Mr. Kelley still intended to get "favors" from Ms. Watkins if she had continued to work at PSB.

PSB claimed it had a sexual harassment policy, including employee training, handbook materials, and a video. However, this policy was described by Mr. Fisher as "an on-going development of the corporate training department." And the company video on the topic was not even made until 1997.

The evidence as to PSB's policy was contradictory, particularly over whether training was given and the timing of the policy regarding the events surrounding the May, 1996 rape incident. In fact, Mr. Fisher, vice president for operations, himself never received sexual harassment training while at PSB.

A policy statement about sexual harassment was posted

on a wall in PSB's Maryland office, along with other announcements. It is unclear whether employees' attention was called to it. Ms. Watkins said she never saw such a notice.

At trial, the jury was instructed as to quid pro quo sexual harassment, hostile work environment, and retaliation. On September 3, 1998, the jury returned a verdict for Petitioner. Responding on a special verdict form, the jury found for PSB as to quid pro quo sexual harassment. Notwithstanding this finding, the jury found that sexual harassment had occurred and found PSB had created a hostile work environment. The jury awarded damages of $63,222.

C. District Court's Ruling on Punitive Damages

Granting the Respondent's motion on punitive damages, the District Court noted that Ms. Watkins did not bring the May 1996 incident to the attention of anyone at PSB until August of that year, and then did not describe the incident in terms of rape. Even though the incident was "reprehensible," the Court found it was not part of and did not reflect a "continuum of conduct" by PSB regarding sexual harassment. [See Appendix at 5a et seq.].

The Court said once the incident was reported, PSB officials looked into it. "The evidence shows that Fisher told Kelley to stay away from her. There is no evidence of similar conduct by Kelley or by any other employee of the defendant company." Therefore, "the Court cannot find that the conduct in question was so egregious as to warrant the imposition of punitive damages. More specifically, the Court finds that no jury could reasonably find the existence of punitive damages." [Appendix at 8a-9a].

D. District Court Grants Judgment to PSB on Merits

Granting the subsequent motion by PSB for judgment as a matter of law [Appendix at 28a et seq.], the District Court found, as to hostile work environment, that the claim was

demonstrated but that an affirmative defense was also established. The Court observed an employer can present a defense to liability if it can show it a) exercised reasonable care to prevent or promptly correct the behavior and b) the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." The District Court then added [App. at 30a-31a]:

> The court finds that Professional Security has not only presented sufficient evidence to establish the affirmative defense, but additionally that there is insufficient evidence for permitting any other finding. The evidence supporting Professional Security's affirmative defense is so overwhelming and one-sided that the court cannot uphold the jury's rejection of that defense.
>
> It is undisputed that Watkins waited until August, 1996, nearly four months, before she complained to anyone at Professional Security about the harassment, at which time she told one of her site supervisors, Hazel Dowling, only that Kelley had 'grabbed' or 'touched' her breasts. She did not inform anyone at Professional Security, at any time, that she was the victim of forced sexual intercourse. * * *
>
> It also is undisputed (1) that Professional Security had a policy against sexual harassment, (2) that it promptly investigated Watkins's complaint, (3) that it took remedial action by directing Kelley not to have further contact with Watkins, and (4) that Kelley did not harass Watkins again.

Therefore, the District Court found:

> In light of the undisputed evidence, the only reasonable conclusion that the jury could reach in this case is that Professional Security exercised reasonable

> care to prevent and correct promptly the sexually harassing behavior and that Watkins, by not complaining to anyone at Professional Security about the harassment until August 1996, unreasonably failed to take advantage of any preventive or corrective opportunities provided by Professional Security or to avoid harm otherwise. Hence, Professional Security must prevail against Watkins on the affirmative defense to the claim of sexually hostile work environment as a matter of law.

As to the claim of retaliation, the District Court found Petitioner did not establish the requisite "causal connection" between her termination and her engaging in protected activity, or, that PSB presented a legitimate reason for her termination (Ms. Watkins' alleged job performance problems) which Petitioner did not show was a pretext. The District Court stated [Appendix at 32a-33a]:

> Even if the court assumes that Watkins presented sufficient evidence of a causal connection, Professional Security has articulated legitimate, nonretaliatory reasons for her termination and Watkins has failed to offer sufficient evidence that the reasons were pretexual. Concededly, Watkins offered some evidence on this score. Her evidence, however, consisted essentially of offering her own opinion that her job performance had been satisfactory. She testified that she had been given only one uniform, which she had needed to launder, and that she had left her post unattended to assist elderly residents.

Therefore, as to the retaliation claim:

> In light of all the evidence, including the uncontradicted testimony that Professional Security investigated the circumstances that necessitated Watkins leaving her post unattended, this evidence is insufficient to discredit, in the mind of a reasonable juror, Professional Security's legitimate, nonretaliatory explanation for her termination. Accordingly, Watkins has failed, as a matter of law, to meet her ultimate burden of showing that Professional Security had a retaliatory motive in discharging her.

E. Fourth Circuit Affirms District Court

Affirming the District Court, the Fourth Circuit found that Ms. Watkins' testimony that she did not receive sexual harassment training could not be believed. [See Opinion at fns. 7 and 15, and accompanying discussion]. It also indicated that her job performance difficulties provided sufficient basis for her termination and that this rationale was not a pretext.

As to the affirmative defense available to a claim of hostile work environment (see Burlington Industries, Inc. v. Ellerth, 524 U.S. ___, 141 L.Ed.2d 633, 118 S.Ct. 2275 (1998)), the Fourth Circuit recognized that this Court identified two types of sexual harassment cases: "those in which threats of adverse action in retaliation for denial of sexual favors are carried out in the form of a tangible employment action, and those in which no tangible employment action is taken." [Opinion at p. 7, emphases supplied].

The "affirmative defense" employed by the District Court, was identified by this Court in Burlington as available when no "tangible" employment action is taken. However, the Fourth Circuit determined the defense was available here, even though Petitioner was terminated, because her contention of adverse employment action supposedly was restricted to her retaliation

claim. Thus, no "tangible" employment action was connected to her hostile work environment claim.

Thus applying the affirmative defense in Burlington, the Fourth Circuit concluded that "no reasonable jury could fail to determine that PSB acted reasonably "'to prevent and correct promptly any sexually harassing behavior.'" [Noting Burlington]. PSB offered "essentially uncontradicted evidence" that it had in place a "comprehensive policy" against sexual harassment. [Opinion at 8]. The Fourth Circuit also found that "there can be no dispute that PSB acted promptly upon learning of Watkins' allegations of sexual harassment."

The Court also concluded Ms. Watkins had "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" by not reporting the incident in accordance with PSB's sexual harassment policy. [Opinion at 10-11]. The Court found Ms. Watkins' claims of embarrassment and fear of reprisal were not sufficient reasons for the delay. Therefore, "Although Watkins established the existence of a hostile environment, we conclude that no rational jury could have failed to find that PSB established the elements of the affirmative defense to liability set forth in Burlington Industries." [Opinion at 13]. In addition, the Fourth Circuit indicated that if the first element of this affirmative defense is shown, it may be applied even if the second element is not. [Footnote 18].

Affirming the District Court's ruling for Respondent on Petitioner's retaliation claim, the Fourth Circuit concluded that PSB offered a legitimate and non-discriminatory reason for Petitioner's discharge, in that Ms. Watkins had once left her post at Bennett House. The Court said Petitioner "offered no evidence whatsoever that this reason was a mere pretext for retaliation." [Opinion at 13]. Accordingly, her claim failed as a matter of law.

REASONS FOR GRANTING WRIT

I. UNDER *BURLINGTON*, THE AFFIRMATIVE DEFENSE TO A HOSTILE WORK ENVIRONMENT CLAIM IS NOT AVAILABLE WHERE THERE HAS BEEN A TANGIBLE EMPLOYMENT ACTION, AND SUCH A TANGIBLE EMPLOYMENT ACTION WAS SHOWN IN THIS CASE.

In Burlington Industries, Inc. v. Ellerth, 524 U.S. ___, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), this Court discussed the "affirmative defense" to a hostile work environment claim in the context of a victim of employment sexual harassment who does not reveal that harassment, who takes no action during employment concerning the harassment, and who does not suffer adverse, tangible job consequences as a result of the harassment or her attempts to correct it while employed.

This Court noted, perhaps in an observation of the difficulty the judiciary has had in considering workplace sexual harassment claims under Title VII, that the Court of Appeals for the Seventh Circuit, reversing summary judgment granted to the employer, conducted an en banc review which resulted in eight separate opinions and "no consensus for a controlling rationale." (141 L.Ed.2d at 645). This observation also suggests the hostile work environment and affirmative defense standards are still evolving concepts, so that a jury determination is entitled to considerably more weight when a trial court is faced with a motion for judgment as a matter of law, for judgment notwithstanding verdict, or for new trial.

This Court noted a demarcation between harassment situations in which threats of adverse action if sexual favors are not forthcoming are not carried out (quid pro quo harassment) as opposed to situations where such threats are carried out (hostile

work environment). The Court engaged in an extensive discussion of these variations, and stated (141 L.Ed.2d at 648):

> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

The Court considered circumstances in which a hostile work environment situation does not necessarily result in "tangible" adverse action against the victimized employee. The Court turned to policy issues regarding Title VII's purpose in encouraging antiharassment policies and "effective grievance mechanisms." The Court stated, "Were employer liability to depend in part upon an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." (141 L.Ed.2d at 654, citations omitted). Limiting employer liability in such contexts "could encourage employees to report harassing conduct before it becomes severe or pervasive" and so "would also serve Title VII's deterrent purpose."

The Court crafted a defense to such circumstances "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees... ." (141 L.Ed.2d at 654-655). An employer can be vicariously liable for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee."

However, "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." [Emphasis supplied, citations omitted]. The defense is established if the employer shows that it 1) exercised "reasonable care" to prevent and correct promptly any sexually harassing behavior and 2) the employee "unreasonably failed" to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

As this Court clearly described, "no affirmative defense is available" when the supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." That was the situation here. The Fourth Circuit should not be permitted to ignore the limits of the affirmative defense to a hostile work environment claim by pigeonholing Petitioner's claims.

In her Complaint, Petitioner did not differentiate between her hostile work environment claim and her retaliation claim in seeking relief for the sexual harassment she endured at PSB which eventually resulted in her termination. Her claims arose from the same set of facts and the same background of harassment and intimidation. [See Complaint, esp. at App. at 2a-3a]. She therefore contended that her termination was the result of sexual harassment as well as in retaliation for her engaging in protected activity (reporting the May, 1996 rape incident to authorities and to the EEOC).

As alleged and as the evidence bore out, this hostile work environment situation did result in "tangible employment action." The Fourth Circuit mischaracterized Petitioner's claim in concluding that the adverse employment action related only to her claim of retaliation. It decided that since Petitioner

supposedly was not contending that the "tangible" employment action occurred in the context of a hostile work environment, the defense was available. This was not a fair reading of Petitioner's claims. The defense should not have been applied.

This Court should grant this Petition to clarify that when a tangible employment action has resulted from the circumstances which form the basis of an employee's complaint under Title VII, the affirmative defense described in Burlington Industries is not available. Separating the employment action from the technical claim itself, most especially if the action is termination, is not appropriate when considering whether to apply the defense.

II. IF THE AFFIRMATIVE DEFENSE UNDER *BURLINGTON* TO A HOSTILE WORK ENVIRONMENT CLAIM IS AVAILABLE, EVIDENCE ESTABLISHING THE FIRST ELEMENT OF THE DEFENSE SHOULD NOT BE SUFFICIENT TO PERMIT AN EMPLOYER TO APPLY THE DEFENSE, IF THE SECOND ELEMENT OF THE DEFENSE IS NOT SHOWN

Even if the affirmative defense to a hostile work environment claim was available in these circumstances, it should not have been applied because the evidence did show that Petitioner took reasonable steps to "take advantage of any preventive or corrective opportunities provided by the employer." The Fourth Circuit conceded this possibility and yet found that the affirmative defense could be applied.

The Fourth Circuit stated (footnote 18) that "Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment--as PSB did here [reference omitted]--would be held liable for the

harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense." Citing Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999), at 265-66, and Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999), at 1369 (Barkett, J., concurring specially). The Fourth Circuit suggested, quoting the concurrence in Coates, that under Burlington, "a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII" where the affirmative defense is available. Any other result, the Fourth Circuit stated, "would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in Burlington Industries: to promote conciliation."

Such a statement essentially cuts the affirmative defense, and the employer's burden, in half. The Fourth Circuit not only ignored the limits of the affirmative defense to a hostile work environment claim, but applied it half-heartedly in affirming the District Court's essential dismissal of her claim as a matter of law, and in the process overturning a jury verdict favorable to Petitioner.

Promoting conciliation in sexual harassment situations and fostering an environment where sexual harassment is not a concern for employees are worthy goals. But interest in achieving those goals should not lead to absolving an employer from a need to show, as an essential part of interposing an affirmative defense to a hostile work environment claim,, that the employee failed to "take advantage of any preventive or corrective opportunities provided by the employer." The Fourth Circuit suggests that if this showing was not made in the present matter, then the defense, was not established. Thus, the hostile work environment claim should have proceeded and the jury's verdict should not have been overturned.

This Court should grant the Petition and emphasize that both elements of the affirmative defense to a hostile work environment claim, if available, are to be shown. Therefore, it is the employer's burden to demonstrate that it exercised "reasonable care" to prevent or promptly correct the behavior and that the plaintiff employee "unreasonably failed" to take advantage of any "preventive or corrective opportunities" or "to avoid harm otherwise."

The affirmative defense in Burlington is not a shortcut means for an employer faced with a hostile work environment claim to exit the courthouse. This Court should grant this Petition and clarify both the limits and the role of this defense.

III. PETITIONER'S RETALIATION CLAIM WAS WELL ESTABLISHED, AND THE EMPLOYER DID NOT SHOW, UNDER PREVAILING STANDARDS, A LEGITIMATE NON-RETALIATORY REASON FOR ITS TERMINATION OF PETITIONER

Turning to Petitioner's retaliation claim, the District Court found that Respondent had presented a legitimate and non-retaliatory rationale for her termination which Petitioner did not meet with any evidence that this rationale was a pretext. The Fourth Circuit affirmed, pointing out that Ms. Watkins had once left her post at Bennett House. The Fourth Circuit said Petitioner "offered no evidence whatsoever that this reason was a mere pretext for retaliation."

This conclusion is a selective view of the evidence. It also completely disregarded the jury's careful deliberation over the days of testimony it heard on Petitioner's sexual harassment and retaliation claims. Petitioner certainly showed that she was terminated in the same month (August, 1996) that she reported the May, 1996 rape incident to co-workers, her supervisor, and

the police. She was terminated for supposedly "leaving her post" or other employment infractions which were not cause for any termination previously. Just a year before, she was considered by Donald Nicola at PSB as a favorite employee. He understood her circumstances and assisted her as she tried to work out her child responsibilities and her job duties. The evidence suggested that Petitioner had not been previously disciplined at PSB. Yet, when the facts of the May, 1996 incident came to light and Mr. Kelley realized that Ms. Watkins would not submit to his controlling and manipulative behavior, Ms. Watkins was dismissed.

At the very least, the evidence was sufficient to permit a jury to decide whether PSB's rationale for Ms. Watkins' dismissal was a pretext, given the circumstances. The jury found that she was entitled to recover. That finding should not have been disturbed.

This Court should grant this Petition to review circumstances in which a trial court (and, subsequently, an appellate court) can remove from jury consideration core features of a retaliation claim, such as whether the plaintiff employee has shown that the employer's termination rationale is pretexual. These are proper matters for a trier of fact. A finding as a matter of law that the employee has not met that burden should be exceedingly rare, and was inappropriate in this instance.

IV. UNDER THIS COURT'S RECENT OPINION OF *KOLSTAD V. AMERICAN DENTAL ASSOCIATION*, PUNITIVE DAMAGES WERE AVAILABLE TO PETITIONER AND THE DISTRICT COURT ERRED IN REFUSING TO PERMIT JURY CONSIDERATION OF PUNITIVE DAMAGES.

Finally, this case should be remanded for a further consideration of punitive damages in light of this Court's Opinion

in Kolstad v. American Dental Association, 527 U.S. 576, 144 L.Ed.2d 494, 119 S.Ct. 2118 (1999). The case was decided while the appeal to the Fourth Circuit was pending. The Fourth Circuit did not consider Kolstad, in that it did not reach the punitive damages issue. Nevertheless, particularly since Kolstad, it is clear that the District Court erred in granting Respondent's motion for judgment, removing punitive damages from jury consideration.

In Kolstad, this Court, reviewing 42 U.S.C. §1981a, found that the statutory language of "malice" and "reckless indifference" for imposing punitive damages relate to an employer's "state of mind." The employee must show that the employer not only directly engaged in discriminatory conduct, but also that the employer was aware that this conduct violates federal law. However, a plaintiff need not show "egregious" or "outrageous" discrimination independent of showing that the employer's "state of mind" revealed an awareness that the discrimination at issue was a violation of federal law and policy.

The Kolstad decision stated that, consistent with standard agency principles that are applicable generally to Title VII situation, punitive damages may be imposed upon an employer due to the intentional actions of an employee or agent if that person was employed in a managerial capacity and was acting in the scope of employment when engaging in the offending conduct. As such, an employer's conduct need not be independently "egregious" to satisfy §1981a's requirements for a punitive damages award, "although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof." [144 L.Ed.2d at 512]

However, to support Title VII's broader objective of employer development of reasonable and practical workplace policies on sexual harassment, an employer may not be held vicariously liable for the discriminatory employment decisions of

managerial agents if those decisions are "contrary to the employer's good faith efforts to comply with Title VII." [See discussion at 144 L.Ed.2d at 510-512]. Such an approach may "motivate" employers to "detect and deter Title VII violations." [114 L.Ed.2d at 512, citing case at issue, at 139 F.3d 958, dissent].

In so deciding, the Kolstad Court did not expressly overturn the general approach that the mere existence of a sexual harassment policy is not in itself an indication that malice or recklessness is absent from sexually harassing conduct. Rather, it reiterated that there must be some showing of a "good faith" effort by the employer on these concerns which sets the employer's attitude so far apart from the conduct of an offending manager, that vicariously liability should not be imposed on a policy basis. That showing was not made in these circumstances.

There was no investigation by PSB, to speak of, after Ms. Watkins' report of the incident. That Mr. Kelley was told to stay away from Ms. Watkins, after Mr. Fisher learned that he may have raped her, is hardly a shining example of corporate concern about sexual harassment. There was evidence from four witnesses (Ms. Watkins, Ms. Dowling, Mr. Nicola, and Mr. Fisher) that Mr. Kelley had sexually harassed another employee, Ms. Kia Odom, prior to this incident. There is no indication that the company, despite its sexual harassment policy, did anything to investigate or take corrective action as to that incident.

What sexual harassment training was given to employees in 1996 or earlier, was the subject of considerable conflict. There certainly was no training video at that time. Even Mr. Fisher said he was not given such training. Also, there were no "posters throughout the plant" as to sexual harassment (as suggested by the District Court, see App. at 6a). There was one posting of the 1992 memorandum, on a board in a conference room.

There was sufficient basis for a jury to consider punitive damages. The evidence of PSB's conduct was not sufficient to overcome vicarious imposition of punitive damages for Mr. Kelley's outrageous and egregious conduct.

In general, punitive damages is an extraordinary remedy. See, as to decisions noted by the Fourth Circuit, Harris v. L & L Wings, Inc., 132 F.3d 978 (4th Cir. 1997), and Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988). Punitive damages are to be awarded where "the twin aims of punishment and deterrence are paramount." A plaintiff seeking punitive damages in a Title VII sexual harassment claim must make a "heightened showing" of the culpable state of mind of the employer, not just of the harasser. This showing can include: 1) evidence of the employer's attitude towards sexual harassment, 2) direct statements by the employer about plaintiffs' rights or complaints, and 3) the egregiousness of the conduct at issue.

As the Harris Court stated [citations omitted]:

> The legal standard of 'prompt and adequate remedial action' in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser. And a good faith investigation of alleged harassment may satisfy the 'prompt and adequate' response standard, even if the investigation turns up no evidence of harassment. Such an employer may avoid liability even if a jury later concludes that in fact harassment occurred.

Thus, the existence of a sexual harassment policy is not dispositive. The extent of that policy in 1996 and the extent of training concerning it was a matter for the jury. The investigation undertaken by PSB of the incident was minimal. No disciplinary action was taken against the offending employee. There was evidence that this supervisor had engaged in sexual harassment against at least one other female employee. Petitioner heard

nothing more about her report and was told not to say anything about it to anyone else in the company. And the conduct was most assuredly "egregious."

In Jonasson v. Lutheran Child and Family Services, 115 F.3d 436 (7th Cir. 1997), the court found punitive damages appropriate in a sexual harassment claim involving a school. The court remarked upon the employer's "ostrich-like failure" to deal forthrightly with the principal's harassment of three young employees over a period of time. The school was aware of previous incidents but took no substantive action. There was never anything put in the principal's file regarding the harassment despite these reports, the school was lenient in its treatment of the principal in order to avoid a lawsuit by him, and the school took "woefully corrective action" against the principal.

The court noted "the jury was entitled to conclude from the evidence presented that [the school] showed a lack of remorse and that such conduct was likely to happen again. Such an 'intentional disregard for the statutory rights of its female employees' justifies the award of punitive damages.'" Citing Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996).

In Turic v. Holland Hospitality, Inc., 849 F.Supp. 544 (W.D. Mich. 1994), considering a claim of pregnancy discrimination and religious discrimination as to the plaintiff employee's decision to obtain an abortion, which ultimately resulted in her discharge by the employer because of the controversy the situation created with other employees, the court upheld a $300,000 punitive damages award, even though the court found that the employer was not necessarily motivated by malice. The court found, nevertheless, that the manner in which the employer responded to the employee's consideration of an abortion was recklessly indifferent to her rights not to suffer an adverse employment action due to pregnancy. The court stated,

"Defendant moved swiftly to remove a 'troublemaker,' without regard to the fact that the source of the 'trouble' was a federally protected status."

See also, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998) (approving punitive damages, although remitting the amount from $100,000 to $75,000 where compensatory damages were only $19,000, although evidence of malice or reckless indifference were not overwhelming); Doe v. R.R. Donnelly & Sons Co., 42 F.3d 439 (7th Cir. 1994) (as to punitive damages); Hennessy v. Penril Datacomm Networks, 69 F.3d 1344 (7th Cir. 1995) (evidence sufficient to support punitive damages award); Hearn v. General Electric Co., 927 F.Supp. 1486 (M.D. Ala. 1996); Lawyer v. 84 Lumber Co., 991 F.Supp. 873 (N.D. Ill. 1997) (punitive damages found available but remitted from $250,000 to $100,000); Emmell v. Coca-Cola Bottling Co., 904 F.Supp. 723 (N.D. Ill. 1995), aff'd, 95 F.3d 627 (policy of sex discrimination in promoting warranted punitive damages of $500,000), and Deters v. Equifax Credit Information Service, Inc., 981 F.Supp. 1381 (D.Kan. 1997) (approving punitive damages award of $295,000).

Even before Kolstad, if the Kolstad Opinion would not apply to the District Court's punitive damages determination since that determination was made prior to the issuance of the Opinion, courts have considered the employer's overall attitude and policy toward sexual discrimination when reviewing imposition of punitive damages, particularly under §1981a, and despite the existence of a sexual harassment policy. Promulgating such a policy and placing it in any employee handbooks or on bulletin boards should not be enough, in itself, to insulate an employer from punitive damages liability from sexual harassment conduct so egregious that it would constitute a criminal offense. Rather than being a shield against punitive damages, the presence

of a sexual harassment policy should merely be one factor in a more comprehensive review of the specific circumstances. This Court should grant this Petition to review under what circumstances will the mere existence of a sexual harassment policy absolve an employer from punitive damages in a Title VII claim, especially if the conduct was committed by a manager, was egregious, and was either poorly handled or poorly investigated.

Punitive damages clearly should have been imposed here. Petitioner requests that this Court grant her petition and further clarify the role that the mere presence or existence of an employer's sexual harassment policy will play in the overall consideration of imposing punitive damages upon that employer in Title VII claims arising from egregious sexual harassment.

CONCLUSION

Accordingly, Petitioner respectfully requests that her petition for a writ of certiorari be GRANTED.

RESPECTFULLY SUBMITTED,

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(Counsel of Record)
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3500 Hilton Road
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(410) 542-5400

C. WILLIAM MICHAELS
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1579 Dellsway
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(410) 321-5770

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
[Filed February 20, 1997]

ANGEL WATKINS *
1510 Pennsylvania Avenue
Apt. 102 *
Baltimore, Maryland 21215
*
Plaintiff
*
vs.
*
PROFESSIONAL SECURITY
BUREAU, LTD. *
1301 York Road
Suite G 1 *
Lutherville, Maryland 21095
*
SERVE ON:
*
Corporate Trust, Inc.
32 South Street *
Baltimore, Maryland 21202
*
Defendant

****

COMPLAINT AND REQUEST FOR A JURY TRIAL

JURISDICTION

Now comes the Plaintiff, Angel Watkins, by her attorney, A. Dwight Pettit, and says:

1. The jurisdiction of the Court is brought pursuant to 28 U.S.C. 1343(4). This suit is brought pursuant to Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. as amended.

2. Plaintiff filed a charge of sex discrimination, harassment and retaliation with the E.E.O.C. on or about September 18, 1996 and November 10, 1996. Plaintiff received a Notice of Right to Sue dated December 17, 1996 which is attached hereto. The discrimination was and is being committed in the State of Maryand.

PARTIES

3. Plaintiff, Angel Watkins, is a female citizen of the State of Maryland.

4. Defendant, Professional Security Bureau, Ltd, does business in the State of Maryland. It is an employer within the meaning of Title VII of the 1964 Civil Rights Act. Its business affects interstate commerce.

CAUSE OF ACTION

5. That the Plaintiff, Angel Watkins, reincorporates as fully stated herein the allegations of Paragraphs 1 through 4.

6. That Plaintiff was employed by the Defendant Professional Security Bureau, LTD. in and around July, 1995 and was subject to constant sexual harassment by the Defendant's Director of Security.

7. That Plaintiff did not acquiesce [to] or condone the sexual harassment she was subjected to by her Supervisor. Plaintiff was subject to constant sexual harassment, including but not limited to the following as detailed in her Complaint to the Equal Employment Opportunity Commission.

8. In May of 1996, Plaintiff was reprimanded for bringing her children to work. She was then told by her immediate supervisor, Ed Kelly, that she owed him a favor

(allegedly for intervening in said reprimand proceeding in favor of the Plaintiff) whereupon, he forced the Plaintiff to have sexual intercourse.

9. In August of 1996, the Plaintiff reported the matter to Supervisor Don Decola, who indicated that this matter would be investigated.

10. Ed Kelly approach Plaintiff, again, in August of 1996 and, again, demanded sexual favors in return for his intervention in another personnel matter involving Plaintiff.

11. The Plaintiff, having been forced to have sex on the first occasion, was able to avoid same upon this encounter.

12. On September 16th, Mr. Decloa called the Plaintiff and indicated he would take care of the matter.

13. The Plaintiff was subsequently terminated.

14. Said termination was due to a retaliation for the Plaintiff's reporting of said sexual contacts and overtures by Ed Kelly.

15. The Defendant, Professional Services Bureau, Ltd., wrongfully hired and maintained the employment of Ed Kelly knowing he had a reputation and past history of approaching female co-workers seeking sexual favors.

16. That as a result of the sexual acts perpetrated Ed Kelly the Plaintiff was unable to properly perform her job.

17. That Defendant engaged in a pattern of sexual harassment and allowed same from its male employees against female employees.

18. As a result of the acts perpetrated by the Defendant, the Plaintiff has suffered humiliation, embarrassment, and emotional trauma and loss [of] income.

WHEREFORE, the Plaintiff prays this Honorable Court to grant her the following relief:

(1) Declaratory and injunctive relief ordering her job

reinstated with back pay and an order prohibiting the Defendants from engaging in further sexual harassment;

(2) Punitive and compensatory damages;

(3) Attorney fees, interest and costs; and

(4) Such other and futher relief as the Court deems necessary.

Respectfully submitted,

/s/

A. DWIGHT PETTIT
3500 Hilton Road
Baltimore, Maryland 21215
(410) 542-5400
ATTORNEY FOR PLAINTIFF
01697

PRAYER FOR JURY TRIAL

Plaintiff prays to have this case tried by a jury.

/s/

A. DWIGHT PETTIT

APPENDIX B

Ruling from the bench, decision of United States District Court for the District of Maryland, as to punitive damages, at hearing of September 4, 1998, following jury verdict awarding compensatory damages:

THE COURT: Thank you, gentlemen. The Court is prepared to rule.

Initially, I think the law is clear that punitive damages must be proven by a preponderance of the evidence. More specifically, the plaintiff must show that the defendant acted with malice or with reckless indifference to the plaintiff's right not to be discriminated against on the basis of her sex and--I think, more specifically, the Harris case--I am talking about Harris v. Wing, 132 F.3d 978, that is a Fourth Circuit case, decided in 1997--has some very pertinent language; and I quote:

> 'Punitive damages are an extraordinary remedy to be reserved for egregious cases. It is well-established'--and this is omitting citations--'that exemplary damages are not an element of recovery in every case involving an intentional tort. Specifically, the text and background of the Civil Rights Act of 1991, which authorizes punitive damages, emphasized that this extraordinary remedy is not to be awarded automatically in every successful Title VII suit. The 1991 act approves punitive damages--and

I am citing from Page 982 of the opinion. Repeating:

> 'The 1991 act approves punitive damages only if the complaining party demonstrate[s] that the respondent engages in a discriminate practice or discriminate [p]ractices wth malice or with reckless indifference to the federally protected rights of an aggrieved individual.

> Indeed, plaintiffs must first prove intentional discrimination. They must prove actual injury or loss arising therefrom to recover compensatory damages and must meet an even higher standard establishing that the employer acted with malice or reckless or callous indifference to their rights to recover punitive damages.'

To a similar effect is another Fourth Circuit case, which I think is relevant, that is Notter, N O T T E R v. North Hand Protection, 89 F.3d 829, 1996, quoting from page--I don't have a page number. I have the quotation from West:

> 'We recognize that punitive damage awards should be carefully scrutinazed so as not to become vehicles for unbridled retribution. The statute, however, already addresses these concerns in two ways: 1) by providing that punitive damages may be awarded only in cases where the defendant either acts maliciously or out of reckless indifference toward the plaintiff for federally protected rights; and 2) by providing for caps in damage awards. We see no need to impose additional limits on punitive damages when Congress could have done so but [did] not.'

Now, against that background, this motion by the Defendant for a directed verdict under Rule 50, the question is whether, based on the evidence before a jury reasonably could have awarded punitive damages.

Given that consideration, the Court finds as follows: In this case, the Defendant did have a written policy prohibiting discrimination. Undisputedly, that policy existed since 1991 or 1992. Also, it is undisputed that there were posters throughout the plan indicating that sexual harassment would not be permissible.

The undisputed evidence also indicates that that policy

was disseminated among the employees, although the Court is aware of the fact that Plaintiff did not herself receive a copy of the handbook and apparently did not see the posters.

In any event, I think the jury could, based on the evidence, I think it is with respect to the handbook, the evidence is undisputed that there was a handbook distributed to employees and that posters were circulated.

Beyond that, there is no disputed--I beg your pardon. The evidence--the overwhelming evidence is to the effect that training was given to employees of the defendant company.

Now, beyond that, looking at the evidence in a light most favorable to the Plaintiff, as the Court must, it shows that the Defendant--the Plaintiff testified that she was raped in May of 1996. She also testified that she did not bring that incident--that horrible incident, if you will--to the attention of anybody in the company until August, almost three months later. And she did not, however, advise her supervisors that she was raped. She indicated, at best, that, number one, Mr. Kelley groped her--fondled her breast; and secondly, that Mr. Kelley had reached under her skirt and under her pants. There is no evidence in the record, whatsoever, that the company was aware until much later after the termination of the Plaintiff and Mr. Kelley that a rape had occurred.

Beyond that, the situation that she told Ms. [Hazel] Dowling and Mr. [Donald] Nicola about was certainly reprehensible. There is no question about that, and there is no dispute with respect to its reprehensibility.

However, the Court notes that the evidence shows that this incident did not--was not a continuing one; there was no continuum. It occurred once, and that was in May. There was no repetition.

Beyond that, the evidence shows that when that was

brought to the attention of the Plaintiff's supervisor, Ms. Dowling, she advised, I do not know when, her supervisor, Mr. Nicola.

Furthermore, when this came to the attention of Mr. [Charles] Fisher, the vice president of the company, he advised Mr. Kelley, who was the perpetrator, that this would not be repeated--or rather he told Kelley--I beg your pardon. The evidence shows that Fisher told Kelley to stay away from her. There is no evidence of similar conduct by Kelley or by any other employee of the defendant company.

Given all the circumstances here, the Court cannot find that the conduct in question was so egregious as to warrant the imposition of punitive damages. More specifically the Court finds that no jury could reasonably find the existence of punitive damages.

In that circumstance, the Defendant's Motion for Directed Verdict under Rule 50 with respect to Punitive Damages is hereby GRANTED.

I do not think there is anything else at the moment. The Court will now recess.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

ANGEL WATKINS

*

Plaintiff,

v. * Civil No. L-97-520

PROFESSIONAL SECURITY
BUREAU, LTD.

*

Defendant.

* * * * * * * * * * * * * *

ORDER OF JUDGMENT

The jury having returned a verdict in favor of plaintiff Angel Watkins against defendant Professional Security Bureau, Ltd., it is this 4th day of September, 1998,

ORDERED

1. That judgment is entered in favor of plaintiff Anegl Watkins against defendant Professional Security Bureau, Ltd. in the amount of $3,222.00 for medical expenses (three thousand, two hundred, twenty-two dollars and zero cents); and $60,000 for pain, suffering and mental anguish (sixty thousand dollars and zero cents); for a total of $63,222.00 (sixty-three thousand, two hundred and twenty-two dollars and zero cents).

2. Any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein, and this Order shall be deemed to be a final Judgment within the meaning of Fed. R. Civ. P. 56.

Herbert N. Maletz
Senior Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGEL WATKINS	)	
Plaintiff,	)	
v.	)	Civil No. L-97-520
PROFESSIONAL SECURITY BUREAU, LTD.	)	
Defendant.	)	

MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW defendant, pursuant to Rule 50 of the Federal Rules of Civil Procedure, and moves the Court for entry of an order granting defendant judgment as a matter of law, or, in the alternative, a new trial.

This Motion is based upon a Memorandum of Points and Authorities filed herewith which indicates that the verdict returned in this case is inconsistent, does not comport to the evidence presented at trial and that defendant is entitled to judgment as a matter of law.

Professional Security Bureau Ltd.
By Counsel

ARTHUR, PEARSON & MARTIN, LTD.
101 West Broad Street, Suite 500
Falls Church, VA 22046
/s/

Paul R. Pearson
Counsel for Defendant

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGEL WATKINS Plaintiff, v. PROFESSIONAL SECURITY BUREAU, LTD. Defendant.	)	Civil No. L-97-520

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW defendant, pursuant to Rule 50 of the Federal Rules of Civil Procedure, and in support of its Motion for Summary Judgment as a Matter of Law, or, in the Alternative, For a New Trial and states as follows:

FACTS

1. Plaintiff brought this action against her former employer claiming sexual harassment pursuant to Title VII perpetrated by her supervisor Edward Kelley (hereafter "Kelley").

2. A jury trial was had in this matter commencing on August 31, 1998 and continuing to Septembr 3, 1998.

3. Uncontroverted evidence introduced at trial indicated:

a. Defendant had a written policy against sexual harassment.

b. The sexual assault which forms the subject of plaintiff's claim occurred in May, 1996.

c. The first information which defendant received about this sexual assault was sometime between August 13, 1996 and August 23, 1996.

d. The plaintiff reported to defendant and to certain co-workers only that Kelley had fondled her. At no time during her employment with defendant did plaintiff or anyone else report to defendant that Kelley had forced plaintiff to have sexual intercourse with him.

e. As soon as defendant received notice of the fondling alleged by Plaintiff, defendant told Kelley to stay away from Plaintiff and to have no further contact with her.

f. Plaintiff herself acknowledged that she thereafter had no further contact with Kelley from the time she reported to defendant that Kelley had fondled her to the time her employment was terminated.

g. Plaintiff, on many occasions, did not perform her job duties in a professional manner, including but not limited to arriving at work without being in uniform, leaving her post, bringing her children to work, and performing in a manner causing defendant to lose income, all of which was justification for terminating her employment.

4. The special verdict form returned by the jury found as follows:

a. For the defendant on the issue of whether quid pro quo harassment had occured.

b. For the plaintiff on the issue of whether a hostile work environment had been created.

c. For the plaintiff on the issue of whether she had been retaliated against for reporting the sexual assault perpetrated by her supervisor.

5. The jury was given a jury instruction entitled "'Quid Pro Quo' Sexual Harassment" which instructed them that the third element of quid pro quo sexual harassment was "that her reaction to the harassment resulted in her discharge," and directed them that, "If you find that Ms. Watkins has demonstrated that her acceptance or rejection of Mr. Kelley's sexual advances was the real reason behind the decision to terminate her, then you must find for Ms. Watkins on this claim" [i.e. the claim of quid pro quo sexual harassment.]

6. The jury was also given a jury instructino entitled "Title VII Retaliation Claim" which included as its third element, "that a causal connection existed between her complaint about Mr. Kelley's conduct and her termination," and directed them that, "If you find that Ms. Watkins has demonstrated that her complaining about Mr. Kelley's conduct was the real reason behind the decision to terminate her, then you must find for Ms. Watkins on this claim."

7. At the charging conferences, counsel for defendant objected to the giving of both of these instructions on the basis that they were duplicative, however, both instructions were given.

8. The jury was given a Verdict Form with three question[s], to wit:

a. "Do you find in favor of plaintiff or defendant on plaintiff's claim of quid pro quo sexual harassment?"

b. "Do you find in favor of plaintiff or defendant on plaintiff's claim of sexual hostile work environment?"

c. "Do you find in favor of plaintiff or defendant on plaintiff's claim of retaliation."

9. During its deliberations, the jury sent the Court

a note asking for a definition of the words "quid pro quo." This jury was instructed by the court that the words "quid pro quo" mean literally "this for that" and the jury was again instructed by the court as to the elements of quid pro quo as contained in the Court's instruction.

10. The Verdict Form returned by the jury, a copy of which is attached hereto, contained the following:

a. In favor of the defendant on the question, "Do you find in favor of plaintiff or defendant on plaintiff's claim of quid pro quo sexual harassment?"

b. In favor of plaintiff on the question, "Do you find in favor of plaintiff or defendant on plaintiff's claim of sexual hostile work environment?"

c. In favor of plaintiff on the question, "Do you find in favor of plaintiff or defendant on plaintiff's claim of retaliation."

11. The jury awarded plaintiff $3,222 in medical expenses and $60,000 for pain, suffering and mental anguish.

12. In a hearing after the trial the Court found, as a matter of law, that the evidence did not warrant imposition of punitive damages.

ARGUMENT

I. DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF WHETHER IT IS LIABLE TO PLAINTIFF FOR A SEXUALLY HOSTILE WORK ENVIRONMENT

In a hostile work environment case, the plaintiff must prove that the employer knew or should have known of the harassment in question and failed to take prompt remedial actions. Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10 Cir., 1995); Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5 Cir., 1993); Henson v. City of Dundee, 692 F.2d

897, 905 (11 Cir. 1982). The Fourth Circuit has also so held by analogy, in the case of Dennis v. County of Fairfax, 55 F.3d 151, 155 (4 Cir., 1995) (applying the notice liability scheme of a sexual harassment claim to a racial discrimination claim, the Court held that an employer was not liable after prompt remedial action by an employer redressing the alleged racial harassment.) Constructive knowledge of the presence of harassment is not imparted by mere allegations or office rumors. Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10 Cir. 1997.) The employer must have something more, either actual or constructive knowledge of specific harassing actions. Barrett v. Omaha National Bank, 726 F.2d 424 (8 Cir., 1984).

In the instant case, the evidence is clear that defendant had no actual or constructive notice of any alleged harassment by Kelly until August, 1996, at which time plaintiff gave false notice that Kelley had fondled her. The evidence is likewise uncontroverted that upon learning about the alleged fondling, defendant took appropriate remedial action by separating Kelley from plaintiff and ordering him not to have any contact with her again. This is a reasonable response since plaintiff had reported only a fondling incident. Plaintiff herself acknowledges that this was effective in that she did not have to have contact with Kelley after that.

Based upon this uncontroverted evidence, defendant is entitled to judgment as a matter of law on the issue of sexually hostile work environment.

II. THE JURY HAVING FOUND THAT DEFENDANT WAS NOT LIABLE FOR QUID PRO QUO SEXUAL HARASSMENT, DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF RETALIATION.

The Verdict Form returned by the jury in this case is

inconsistent and does not comport with the instructions given to the jury. The Verdict finds in favor of defendant on the issue of whether quid pro quo harassment occurred.

The jury was specifically instructed that the three elements of quid pro quo harassment were:

> "First, that she was subjected to unwelcome sexual harassment; Second, that the harassment complained of was based on her sex; and Third, that her reaction to the harassment resulted in her discharge."

The jury was further instructed:

> "If you find that Ms. Watkins has demonstrated that her acceptance or rejection of Mr. Kelley's sexual advances was the real reason behind the decision to terminate her, then you must find for Ms. Watkins on this claim"

The jury was likewise instructed that the three elements of sexually hostile work environment harassment were:

> "First, that she was subjected to unwelcome sexual harassment; Second, that the harassment complained of was based on her sex; and Third, that the harassment was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment."

It is obvious that in finding defendant liable for sexually hostile work environment, the jury determined that plaintiff was subjected to unwelcome sexual harassment and that it was based on her sex. It is also apparent that single element which the jury found to be lacking in plaintiff's evidence concerning quid pro quo harassment was the third element, i.e., "that her reaction to the harassment resulted in her discharge," or that plaintiff had failed to prove that "her acceptance or rejection of Mr. Kelley's sexual advances was the real reason behind the decision to

terminate her" as required by the jury instruction.

If the jury had [not] considered only these two claims, then the veredict could be reconciled. However, the jury was instructed to consider a claim for retaliation, which would be proven if the evidence showed that "she complained of being sexually harassed;...that Professional Security fired her; and...that a causal connection existed between her complaining about Mr. Kelley's conduct and her termination."

The jury found for plaintiff on this Court, and therefore must have found that "a causal connection existed between [plaintiff's] complaining about Mr. Kelley's conduct and her termination." This the jury could not logically have found, having already determined that plaintiff had failed to prove in her quid pro quo claim that her acceptance or rejection of Mr. Kelley's sexual advances was the real rason behind the decision to terminate her.

In other words, the jury having found that plaintiff did not suffer and adverse job action because of the harassment in the quid pro quo claim then turned around and found for plaintiff on the claim of retaliation, finding of necessity that her reporting of the harassment did, indeed, result in an adverse job action--her discharge.

Defendant maintains that the jury should not have been instructed in retaliation, since the suffering of a job action was an essential element of the quid pro quo claim. Based on the duplication of elements, and the indication that the jury found no retaliation had occurred as part of the quid pro quo claim, the Court should vacate the finding of the jury concerning retaliation and award judgment as a matter of law to the defendant on said issue.

In the alternative, the Court should consider the divergence between the verdicts returned by the jury as

irreconcilable and award a new trial in this matter.

However, in the interest of judicial economy, and based on the uncontroverted evidence admitted at trial, the Court may rightfully determine that defendant is entitled to summary judgment as a matter of law.

WHEREFORE, defendant prays for an entry of an Order awarding it judgment as a matter of law or, in the alternative, awarding defendant a new trial in this matter.

Professional Security Bureau Ltd.
By Counsel

ARTHUR, PEARSON & MARTIN, LTD.
101 West Broad Street, Suite 500
Falls Church, VA 22046

s

Paul R. Pearson
Counsel for Defendant

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

ANGEL WATKINS	*	
Plaintiff	*	CASE NO. L97-520
PROFESSIONAL SECURITY BUREAU, LTD.	*	
Defendant	*	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Plaintiff, Angel Wakins, by her attorneys, A. Dwight Pettit and the Law Office of A. Dwight Pettit, hereby files Plaintiff's Opposition to Defendant's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial.

I BRIEF HISTORY

On September 3, 1998 the jury in this case returned a verdict in favor of Ms. Watkins. Specifically, the jury found that PSB was liable for creating a hostile environment and for retaliation in a sexual harassment case. The jury did not find quid pro quo sexual harassment. The jury awarded damages of $3,222.00 in medical and $60,000.00 in mental anguish, pain and suffering. This Court entered an Order of Judgment on September 4, 1998 consistent with the Jury's verdict. On September 10, 1998 the PSB's filed a motion that is the subject of this opposition.

The following is a summary of the relevant evidence supporting the jury's verdict. Angel Watkins worked as a security officer with the PSB from July 1995 until September 1996. Professional Security Bureau, Ltd., incorporated in New York, does business in the State of Maryland and has approximately three thousand employees. Mr. Edward Kelley was hired as the branch manager for PSB's regional area in 1995 encompassing New Jersey, New York, Pennsylvania and Maryland. He hird and supervised Mr. Don Nicola, Angel Watkins' direct supervisor and the company's chief investigator of her sexual harassment complaint. He also hired and supervised Ms. Hazel Dowling one of the supervisors to whom Angel Watkins complained of sexual harassment. Mr. Ed Kelley had the authority to hire, fire, demote and promote Don Nicola, Hazel Dowling and Angel Watkins. Although PSB has a company handbook, which includes a policy on sexual harassment, it was not distributed to employees until 1997, after the Angel Watkins incident.

While employed by the PSB, Angel Watkins was diligent, professional and performed her job satisfactorily until the May 1996 rape incident. She was never called in for disciplinary action in 1995 and she worked through her pregnancy in January 1996. She returned to work only after taking one week off after her baby's delivery. Angel Watkins worked as a security officer during her employment by PSB and she was supervised by PSB employee, servant and agent, Ed Kelly. Professional Security Bureau was found liable as an employer for its employee Edward Kelley's reprehensible conduct regarding Angel Watkins claims of sexual harassment.

Throughout Watkins employment, Professional Security Bureau, Ltd. agent, servant and employee Edward Kelley, Angel Watkins' supervisor, engaged in unwelcome conduct of a sexual nature culminating in the alleged rape incident of May 1996. This

unwelcome, non-consensual conduct created a hostile work environment. Both the verbal and physical conduct was heinous and reprehensible. IT changed the conditions of Plaintiff Watkins employment. Special examples of the sexual conduct are detailed in the Police Report 96-262-1890 filed with the Baltimore County Police Department, in Angel Watkins correspondence, in her Complaint, and in her complaint filed with both the Maryland State Commission on Human Relations and the complaint filed with the EEOC. Example of physical acts of harassment are touching Angel Watkins breast in May 1996 and forcing Angel Watkins to have sexual intercourse against her will in May 1996.

Angel Watkins made an account of the event and filed a complaint with the Baltimore County Police Department but they and the States Attorney's office were unable to prosecute because the complaint was filed four months after the incident. Angel Watkins told Don Nicola about the breast touching but not the forced sexual intercourse in August 1996. Don Nicola told Angel Watkins that the alleged breast touching incident would be investigated. On September 16, 1998, approximately one month after reporting the May alleged breast touching incident, Ed Kelly or Don Nicola terminated Angel Watkins from her employment.

In August of 1996 when Angel Watkins advised Don Nicola of the May 1996 breast touching, Nicola promised that he would investigate her complaint. PSB employee, servant, and agent Ed Kelley is Don Nicola's supervisor. Angel Watkins stated that she did not report the forced sexual intercourse sooenr because she was afraid of reprisal, retaliation, and embarassment. Angel Watkins stated in her complaint that had she not told anyone about the May 1996 breast touching she would not have been terminated.

In its motion, PSB denied that it had prior knowledge of any incidents of sexual harassment. At trial, Hazel Dowling, a

PSB supervisor, stated that she talked with Ms. Kia Odom about a sexual harassment complaint but was vague about the date of Ms. Odom's complaint. At trial, PSB denied any knowledge that its employee, Ed Kelly sexually assaulted Angel Watkins. Testimony at trial revealed that Angel Watkins reported Mr. Kelly's breast fondling and fondling of her private area, to Hazel Dowling (which occurred May 1996) and Mr. Don Nicola in August 1996. On May 23, 1996, Ms. Watkins testified that she received a letter to report to PSB's main office on York Road in Luthersville on May 24, 1996. She did and Mr. Kelly told her that he had a lot of complaints about her. He launched into a tirade of verbal abuse. The abuse escalated when Ed Helly harassed and raped Angel Watkins. Angel Watkins did not immediately report the incident because she was embarrassed and feared reprisal and retaliation. Angel Watkins testified that September 16, 1996 when she was called to a meeting with Ed Kelly and Don Nicola, Mr. Kelly started again into a verbal tirade. Ms. Watkins stated that Mr. Kelly was not going to take avantage of her as he had previously done.

II STANDARD OF REVIEW FOR SUMMARY JUDGEMENT

The Defendant's motion asks this Court to overturn the jury's verdict and sweep aside their many hours of careful and thoughtful deliberation. Summary judgment is only proper where the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Miller v. Federal Deposit Ins. Corp., 906 F.2d 972 (4th Cir. 1990). Normally, the court's function at summary judgment is not "to weight the evidence and determine the truth of the matter, but to determine whether here is a genuine issue for trial. Anderson v. Liberty Lobby, Inc.., 477 U.S. 242, 252 (1986). The court must therefore, draw any possible inference from the

underlying facts in a light most favorable to the party opposing the motion. Matushita Elec Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

Defendants have not met their burden. At trial, the jury was presented with three days of testimony from witnesses on both side.

First, the jury heard contradictory evidence regarding PSB's notice of sexual harassment and failure to take prompt remedial actions from Hazel Dowling, Don Nicola, Charles Fisher and Angel Watkins. Second, the jury found that there was also a genuine dispute as to whether or not Angel Watkins engaged in misconduct, which would have provided PSB with a non discriminatory reason for her dismissal.

Now, PSB asserts that the jury instructions were incorrect in certain respects and moves for a new trial.

Now, PSB raises the issue of an inconsistent verdict stating that since it was not found liable for quid pro quo sexual harassment, it is entitled to judgment as a matter of law on the issue of retailiation.

The jury weighed the evidence and determined witnesses' credibility and properly weighed the witnesses' testimony. The instructions were correct and the findings of the jury are not inconsistent. The jury's verdict should be upheld.

III ARGUMENT

A. The Defendant is not entitled to judgment as a matter of law on the issue of whether it is liable to the plaintiff for sexually hostile work environment.

1. Notice to the employer and remedial action

Although this is purportedly a motion for summary judgment the Defendant gave no standard of review and no cases supporting the motion for summary judgment. It the most recent

sexual harassment hostile work environment case, the Supreme Court changed the notice standard. Further, for PSB to argue that it took proper remedial action as to Ed Kelly is illogical. Firstly, they had Don Nicola, a PSB employee who was hired and supervised by Ed Kelly, investigate Angel Watkins claim of sexual harassment. In essence, Ed Kelly was investigating a claim of sexual harassment against himself. This is analogous to the fox who stole and ate the chickens investigating the raid of the chicken coop.

Although PSB claimed that they fired Ed Kelly within a month of Angel Watkins reporting the sexual harassment, there was no evidence that Ed Kelly was suspended with pay or removed from his position pending the outcome of the spurious investigation by his supervisor, Don Nicola. To add further insult to injury, on September 16th when Angel Watkins was fired, she was confronted again by Ed Kelly the main she claimed had raped and harassed her. This is not "prompt remedial action" referred to [in] Defendant's memorandum on p. 4.

Evidence at trial revealed the other employee Kia Odom had complained of harassment by Ed Kelly. There was contradictory evidence on the issue of sexual harassment, hostile environment, employer notice and remedial action presented at trial and the jury found that PSB had a hostile work environment creates by its employee agent and servant, Ed Kelly. Therefore, there can be no question that Ms. Watkins presented enough evidence from which a reasonable jury could have found that she was subject to a hostile environment.

2. <u>There was a genuine dispoute as to employee misconduct</u>

PSB contends that its reason for fiiring Ms. Watkins was that she engaged in employee misconduct. This misconduct was so severe [that] the misconduct caused PSB to lose two accounts.

Specific instances of misconduct included:

(1) Coming to work with her children

(2) Leaving her post unattended

(3) Coming to work without wearing her uniform.

Ms. Watkins presented testimony that:

(1) She was given permission by her employe[r] to bring her children on the job.

(2) She left her post unattended to assist senior citizens entering and leaving the T.V. room, building which is part of her job requirements.

(3) Angel Watkins presented evidence at trial that she was only given one uniform and that it had to be laundered causing her to come to work out of uniform.

(4) Angel Watkins presented evidence at trial that she had no negative documentation in her personnel file. Ms. Watkins was able to demonstrate at trial and the jury found that there was a genuine dispute as to whether or not her termination resulted form her misconduct on the job or PSB was retaliating from her reporting of the sexual harassment claim. Therefore, becuase there were genuine issues as to why Angel Watkins was terminated the Defendant PSB was not entitled to summary judgment as a matter of law.

3 The denial of the quid pro quo claim and [the] prevailing on the retailation claim are not inconsistent

PSB['s] contention that Angel Watkins should not prevail on her retaliation claim because she did not previl on her "quid pro quo" claim is illogical. Under PSB's reasoning, a female employee could not have quid pro quo claim of sexual harassment and a claim of retaliation. In other word[s,] a wom[a]n who complained of unwelcome sexual conduct from her boss and who also claimed that she was fired for reporting that

claim, would be precluded from recovering from both wrongs. In their memorandum on page 6 they have confused the concept of Angel Watkins sexual advances and subsequent firing. The jury found that Ms. Watkins failed to prove her "quid pro quo" claim. This does not preclude the jury from finding that she was fired, not because she rejected or accepted Mr. Kelley's sexual advances but because she reported those advances. For purposes of this Motion the court must view all of the evidence in the light most favorable to Ms. Watkins, resolve all reasonable inferences in her favor, and it should not substitute its judgment for that of this jury as to the credibility of the witnesses. Matushita 475 U.S. 587-88.

In light of PSB's heavy burden and failure to meet same, the jury's verdict should be upheld.

Respectfully submitted,

/s/

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ATTORNEY FOR PLAINTIFF

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGEL WATKINS :

Plaintiff, :

v. : Civil No. L-97-520
(Judge Maletz)

PROFESSIONAL SECURITY
BUREAU, LTD. :

Defendant.

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ORDER

For the reasons set forth in the accompanying memorandum, it is this 22nd day of October, 1998, by the United States District Court for the District of Maryland,

ORDERED:

1) that Professional Security's motion for judgment as a matter of law is granted;

2) that Professional Security's alternative motion for a new trial is conditionally granted;

3) that Watkin's motion for attorneys' fees is denied; and

4) that the clerk send copies of this memorandum and order to the parties.

/s/

Herbert N. Maletz
Senior Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGEL WATKINS :

Plaintiff, :

v. : Civil No. L-97-520
(Judge Maletz)

PROFESSIONAL SECURITY
BUREAU, LTD. :

Defendant. :

::::::::::::::::

MEMORANDUM

Pending in this case is the motion of defendant, Professional Security Bureau, Ltd., for judgment as a matter of law or, in the alternative, for a new trial, and the motion of plaintiff, Angel Watkins, for attorneys' fees.

I.

Watkins brougth this action against Professional Security, her former employer, alleging sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.[1] She claimed that she was the victim of both "quid pro quo" sexual harassment and a sexually hostile work environment. She also claimed that she was fired in retaliation for having

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Professional Security provides security guards for various companies, and Watkins was one of its guards

complained of being sexually harassed. The action went to trial before a jury. Professional Security made a motion for judgment as a matter of law at the close of Watkins's case and at the close of all the evidence. Both motions were denied. The court declined to submit the issue of punitive damages to the jury. The jury returned a verdict in favor of Watkins on the secually hostile work environment and retaliation claims, and awarded damages in the amount of $3,222 for medical expenses and $60,000 for pain, suffering and mental anguish. The jury found in favor of Professional Security on the "quid pro quo" sexual harassment claim. After the verdict was returned, the court entered judgment as a matter of law against Watkins with respect to the issue of punitive damages. The court also entered judgment on the jury's verdict.

II.

Judgment as a matter of law following a jury verdict is appropriate "'when without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.'" Singer v. Dungan, 45 F.3d 823, 826 (4th Cir. 1995); Fed. R. Civ. P. 50(a). The evidence is viewed in the light most favorable to the nonmovant. See Singer, 45 F.3d at 826.

A.

The court first finds that Watkins presented sufficient evidence for a reasonable jury to find that she was the victim of a sexually hostile work environment. Watkins testified that in May 1996 one of her supervisors, Edward Kelley, grabbed her breasts, put his hand in her pants, and forced her top have sexual intercourse with him. This evidence is sufficient to sustain the jury's finding that 1) the conduct in question was unwelcome, 2) it was based on Watkins's sex, and 3) it was sufficiently severe or pervasive to alter Watkins's conditions of employment and to create an abusive work environment. See Swentek v. USAIR,

Inc., 830 F.2d 552, 557-58 (4th Cir. 1987).

An employer is liable to a victimized employee for the sexually harassing conduct of a supervisor. The employer, however, has an affirmative defense. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise." Burlington Indus., Inc. V. Ellerth, 118 S.Ct. 2257, 2270 (1998). The court finds that Professional Security has not only presented sufficient evidence to establish the affirmative defense, but additionally that there is insufficient evidence for permitting any other finding. The evidence supporting Professional Security's affirmative defense is so overwhelming and one-sided that the court cannot uphold the jury's rejection of that defense. See, e.g., Thornhill v. Donnkenny, Inc., 823 F.2d 782, 786 (4th Cir. 1987).

It is undisputed that Watkins waited until August, 1996, nearly four months, before she complained to anyone at Professional Security about the harassment, at which time she told one of her site supervisors, Hazel Dowling, only that Kelley had 'grabbed' or 'touched' her breasts. She did not inform anyone at Professional Security, at any time, that she was the victim of forced sexual intercourse. Cf. Burlington, 118 S. Ct. at 2270 ("[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.").

It also is undisputed (1) that Professional Security had a policy against sexual harassment, (2) that it promptly investigated

Watkins's complaint, (3) that it took remedial action by directing Kelley not to have further contact with Watkins, and (4) that Kelley did not harass Watkins again.

In light of the undisputed evidence, the only reasonable conclusion that the jury could reach in this case is that Professional Security exercised reasonable care to prevent and correct promptly the sexually harassing behavior and that Watkins, by not complaining to anyone at Professional Security about the harassment until August 1996, unreasonably failed to take advantage of any preventive or corrective opportunities provided by Professional Security or to avoid harm otherwise. Hence, Professional Security must prevail against Watkins on the affirmative defense to the claim of sexually hostile work environment as a matter of law.

B.

The court also finds that Professional Security is entitled to judgment as a matter of law with respect to the retaliation claim. To establish a prima facie case of retaliation, Watkins must prove that "(1) [s]he engaged in protected activity; (2) that h[er] employer took adverse employment action against h[er]; and (3) that there was a sufficient casual connection between the protected activity and the adverse employment action." See McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991). The court finds that she has satisfied the first two of the three elements of a prima facie case. She engaged in protected activity by complaining to her supervisors about the harassment and Professional Security took adverse employment action against her by terminating her employment. However, viewing the evidence in the light most favorable to Watkins, the court finds that she has not presented sufficient evidence from which a reasonable jury might infer the existence of a casual connection between her complaining about the harassing conduct and the termination of

her employment by Professional Security.

The fact that Watkins complained of harassment in August 1996, and then, within a short period of time, i.e., in September 1996, was terminated, on its own, is insufficient to support the jury's finding. The evidence showed that Watkins was terminated because of her unsatisfactory job performance. It was undisputed that she received numerous negative performance reviewed within a period of some four months in 1996. In addition, Don Nicola, Watkins's immediate supervisor, testified without contradiction that she had repeatedly come to work without wearing her uniform. He further testified that she had left her post unattended, causing Professional Security to lose the account. The evidence was uncontradicted that Professional Security investigated this incident and that Watkins was discharged on September 16, 1996 pursuant to the personnel policy of Professional Security, which required that her employment be terminated.

Even if the court assumes that Watkins presented sufficient evidence of a causal connection, Professional Security has articulated legitimate, nonretaliatory reasons for her termination and Watkins has failed to offer sufficient evidence that the reasons were pretexual. Concededly, Watkins offered some evidence on this score. Her evidence, however, consisted essentially of offering her own opinion that her job performance had been satisfactory. She testified that she had been given only one uniform, which she had needed to launder, and that she had left her post unattended to assist elderly residents. In light of all the evidence, including uncontradicted testimony that Professional Security investigated the circumstances that necessitated Watkins leaving her post unattended, this evidence is insufficient to discredit, in the mind of a reasonable juror, Professional

Security's legitimate, nonretaliatory explanation for her termination. Accordingly, Watkins has failed, as a matter of law, to meet her ultimate burden of showing that Professional Security had a retaliatory motive in discharging her.

III.

Professional Security has moved, in the alternative, for a new trial. The court assumes, in ruling on the motion for a new trial, that the appellate court will reverse its grant of judgment as a matter of law. See Rule 50(c)(1).

On a motion for new trial, the court should set aside the verdict if it finds that it is against the weight of the evidence, is based on false evidence, or will result in a miscarriage of justice. Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989). The court may weigh the evidence and consider credibility, and the court has wide discretion in making its determination. Hamilton v. 1st Source Bank, 895 F.2d 159, 162 (4th Cir. 1990).

The standard for granting a new trial on the ground that the verdict is against the weight of the evidence is less onerous than the standard applicable for judgment as a matter of law. For this reason, the jury's verdict in favor of Watkins with respect to both of her claims is necessarily against the weight of the evidence, and the court so finds. Accordingly, the court conditionally grants Professional Security's alternative motion for a new trial.

IV.

For the reasons set forth herin, Watkins is not the prevailing party in this case. Accordingly, she is not entitled to an award of attorneys' fees.

V.

For the foregoing reasons, Professional Security's motion for judgment as a matter of law with respect to the claims of sexually hostile work environment and retaliation is granted, and

judgment is entered in favor of Professional Security. Professional Security's motion for a new trial is conditionally grnated. Watkins's motion for attorneys' fees is denied.

Dated: October 22, 1998

/s/

Herbert N. Maletz
Senior Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL WATKINS,
Plaintiff-Appellant,
v.
PROFESSIONAL SECURITY BUREAU, LIMITED,
Defendant-Appellee.

No. 98-2555

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Herbert N. Maletz, Senior Judge, sitting by designation.
(CA-97-520-L)

Argued: September 23, 1999

Decided: November 15, 1999

Before WILKINS, NIEMEYER, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Alvin Dwight Pettit, Baltimore, Maryland, for Appellant. Brian William McAlindin, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L.L.P., Newark, New Jersey, for Appellee. **ON BRIEF:** C. William Michaels, Baltimore, Maryland, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Angel Watkins appeals an order of the district court granting judgment as a matter of law, or in the alternative a new trial, to Professional Security Bureau, Limited (PSB) on Watkins' claims of sexual harassment and retaliation. *See* Fed. R. Civ. P. 50(b)-(c), 59. Because we conclude that no rational jury could have failed to find that PSB established an affirmative defense to liability on the harassment claim, and because Watkins failed as a matter of law to carry her burden on the retaliation claim, we affirm.

I.

PSB provides security services on contract to businesses in several states.[1] In August 1995, Watkins was hired by the Baltimore, Maryland branch office of PSB as a security guard. At that time, the Baltimore office was overseen by Charles Fisher, who was vice president of operations for PSB. Edward Kelley served as the branch manager and reported to Fisher. Don Nicola supervised branch employees and reported to Kelley.

[1]As explained in more detail below, in ruling on a motion for judgment as a matter of law, the district court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility, and we must do the same on appeal. *See Townley v. Norfolk & W. Ry.*, 887 F.2d 498, 499 (4th Cir. 1989). In ruling on a motion for a new trial, however, the district court may consider the credibility of the witnesses and weigh the evidence, and our review is for abuse of discretion. *See Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995). In order to accommodate these differing standards, the facts set forth in the text are those viewed in the light most favorable to Watkins, and relevant conflicts in the evidence are identified in the accompanying footnotes.

BEST AVAIL

Watkins testified, and we assume it to be true for purposes of this opinion, that Kelley raped her in the conference room at the Baltimore office on May 24, 1996. Watkins did not report the attack to authorities at the time it occurred, but did notify her doctor.[2] In July and again in mid-August, Watkins told Site Supervisor Hazel Dowling that Kelley had fondled Watkins' breasts and put his hands down her pants as she was changing clothes in the uniform room.[3] Although Watkins indicated that she did not wish to pursue the matter, Dowling promptly notified Nicola of Watkins' allegation. Nicola then interviewed Watkins, who repeated the same allegation but told Nicola that she did not wish to press the issue.[4] Nicola then informed Fisher of the situation. Fisher spoke to Dowling and requested a meeting with Watkins, which she refused on the basis that she did not want

[2]Watkins' doctor testified that her records indicated no report of the rape by Watkins until October 1996. Additionally, although Watkins maintained that she spoke with the police and personnel at the Equal Employment Opportunity Commission (EEOC) on several occasions before formally reporting the rape in mid-September, the record contains no evidence of such contacts.

[3]Dowling testified that her only contact with Watkins occurred between August 9 and September 5—during which time Watkins worked at the site supervised by Dowling—and that during that period Watkins told Dowling that Kelley had fondled her breasts and put his hands down her pants.

[4]As noted above, Watkins maintains that the attack occurred on May 24. Nicola testified, however, that Watkins told him that the incident occurred on the day she was rehired by Fisher after having been terminated by Nicola for poor job performance. According to Nicola, he terminated Watkins in mid-June 1996, and the termination was rescinded on or about the first of July. At that time, Kelley was on leave recuperating from injuries sustained in an automobile accident.

Watkins claims that she was not terminated during the summer of 1996, but rather was "on call" for a brief period due to lack of work. J.A. 256. However, the record contains a termination report filed by Nicola which indicates that Nicola terminated Watkins for poor performance on July 12. The line for the branch manager's signature bears the notation "recinded [sic]" and the initials "CF". J.A. 502. Additionally, Watkins testified to a "conversation" with Fisher in July 1996 during which Fisher told her that she "needed to thank Mr. Kelley for [her] job because he [Fisher] was going to fire [her]." J.A. 256.

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to follow up on her allegation. Fisher also spoke to Kelley, who denied the accusation made by Watkins. Nevertheless, Fisher instructed Kelley to have no contact with Watkins. Because he had already decided to terminate Kelley for other reasons, and because Kelley was working only part-time and no longer exercised supervisory authority over Watkins, Fisher did not take any further action. Watkins never informed PSB that she was dissatisfied with this result.

Also during August, Watkins was working the night shift at Benet House, a retirement home.[5] During the course of her shift she locked her keys in the day room. Watkins then left the building and went down the street to the handyman's house and asked him to come open the day room door for her. When he refused to do so, Watkins called the manager of the facility, who came and opened the door. The manager subsequently complained to Nicola about Watkins' conduct and ultimately canceled the account.

On September 16, Nicola summoned Watkins to the PSB office, where she met with Nicola, Kelley, and another security officer. Kelley sat behind a desk, while Watkins and Nicola sat in chairs on the other side; the other security officer remained standing. Watkins testified that Kelley told her he had saved her job once, but that she was "still screwing up." J.A. 259. When Kelley further stated that Watkins "owe[d] him a favor," Watkins "stood up, and ... said I don't owe you no favor. You already took advantage of me." *Id.* Watkins then said that she had spoken to the EEOC and the police and intended to press charges against Kelley. In response, Kelley informed Watkins that she was fired.[6]

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[5]Although Watkins testified that the incident at the Benet House occurred during August, Nicola testified that the date was September 15. That is also the date noted on the employee termination report filled out by Nicola.

[6]Nicola's account of the termination is diametrically opposed to Watkins' account. According to Nicola, no confrontation occurred between Kelley and Watkins. Nicola testified that he summoned Watkins to the office and asked her about the incident at Benet House. Watkins acknowledged that she had left her post, at which point Nicola terminated her. According to Nicola, although Kelley was in the PSB office at the time of the meeting, he was not in the conference room during the meeting and had no input into the decision to fire Watkins.

Throughout Watkins' tenure at PSB, the company had a policy against sexual harassment. The basic components of the policy were set forth in a memorandum that was posted on the wall of the conference room where all training was conducted and where employees collected their paychecks. The memorandum encouraged employees who had been harassed to contact PSB's director of human resources and included two phone numbers, one of them toll-free, for such reports. Further, the policy was outlined in detail in the employee handbook, which was given to each employee upon hiring; an additional copy was placed at each security post. And, all employees received training about the policy as part of the orientation process. Watkins denied being given a copy of the employee handbook and denied receiving any orientation or training whatsoever before beginning her employment.[7] Shortly after she was terminated, Watkins instituted this lawsuit alleging quid pro quo and hostile environment sexual harassment based on the rape by Kelley and retaliatory discharge based on her termination after she informed Kelley that she had contacted the EEOC and the police. *See* 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-3(a) (West 1994). A jury found in favor of Watkins on the hostile environment and retaliation claims and awarded damages of approximately $63,000; the jury ruled in favor of PSB on Watkins' quid pro quo claim. The district court refused to submit the issue of punitive damages to the jury, concluding that PSB's conduct was not sufficiently egregious to justify an award of punitive damages. Subsequently, the district court granted PSB's motion for judgment as a

[7]Documentary evidence in the record conflicts with Watkins' testimony that she received no training prior to beginning employment with PSB. To begin, the record contains a document signed by Watkins entitled "STANDARDS FOR PROFESSIONAL SECURITY BUREAU EMPLOYEE." J.A. 570. That document provides that "[a]ll applicants must complete the PSB orientation program and pass the examination at the end of the program to be considered for employment." *Id.* Watkins' signature on this document indicated that she understood and agreed to comply with this requirement. The record also contains a document entitled "EXAMINATION 'A', BASIC 8-HOUR PRE-ASSIGNMENT SECURITY OFFICER TRAINING COURSE." J.A. 535. This item, which also was signed by Watkins, consists of a cover sheet and a 50-question test concerning the provision of security officer services. Answers to the questions are marked on the examination.

matter of law or in the alternative for a new trial on the hostile environment and retaliation claims.

II.

We review the decision of the district court to grant judgment as a matter of law de novo. *See Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir.), *cert. denied*, 68 U.S.L.W. 3106 (U.S. Oct. 4, 1999) (No. 99-180). In so doing, we must view the evidence in the light most favorable to Watkins and draw all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility. *See Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998). "The question is whether a jury, viewing the evidence in the light most favorable to [Watkins], could have properly reached the conclusion reached by this jury." *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*, 52 F.3d 499, 502 (4th Cir. 1995). We may affirm if a reasonable jury could only rule in favor of PSB; if reasonable minds could differ, we must reverse. *See Sales*, 158 F.3d at 775; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (explaining that judgment as a matter of law is proper if "there can be but one reasonable conclusion as to the verdict"); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 799-800 (6th Cir. 1998) (observing that judgment as a matter of law on an affirmative defense is appropriate only if the defense is so clearly established "that no rational jury could have found to the contrary" (internal quotation marks omitted)).[6]

A.

Watkins first contends that the district court erred in granting judgment as a matter of law to PSB on her hostile environment claim. In

[6]In contrast, we review a motion for new trial for abuse of discretion. *See Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995). In ruling on a motion for new trial, the district court "may weigh the evidence and consider the credibility of the witnesses." *Id.* (internal quotation marks omitted). The district court must grant the motion if it finds that "the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice." *Id.* (internal quotation marks omitted).

order to establish the existence of a hostile environment, a plaintiff must demonstrate that "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer." *Spicer v. Virginia Dep't of Corrections*, 66 F.3d 705, 709-10 (4th Cir. 1995) (en banc). There can be little doubt that Watkins' testimony that she was raped by Kelley, which we assume to be true for purposes of this opinion, was sufficient to satisfy the first three elements of a hostile environment claim. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (explaining that "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment"). Rather, the dispute here centers on whether a reasonable jury could have imputed liability for Kelley's conduct to PSB.

The Supreme Court recently articulated standards for imputing liability to employers in sexual harassment cases. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265-70 (1998); *see also Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286-94 (1998). The Court first distinguished between two general types of sexual harassment cases: those in which threats of adverse action in retaliation for denial of sexual favors are carried out in the form of a tangible employment action, and those in which no tangible employment action is taken. *See Burlington Indus.*, 118 S. Ct. at 2264-65. Looking to principles of agency law to inform principles of vicarious liability in Title VII actions, the Court determined that an employer is subject to liability "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 2270. When the supervisor has taken no tangible employment action against the victim of harassment, however, the employer may raise an affirmative defense consisting of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

Watkins first argues that the affirmative defense to liability is not available to PSB because her termination constituted a tangible

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employment action. While Watkins is correct that termination is the quintessential "tangible employment action," *see Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998), there simply is no evidence in the record establishing that Watkins' termination "resulted from a refusal to submit to a supervisor's sexual demands," *Burlington Indus.*, 118 S. Ct. at 2265. Watkins herself acknowledges this fact by arguing that she was terminated in retaliation for threatening to report Kelley's conduct to the police and the EEOC. Accordingly, we hold that PSB was entitled to raise the affirmative defense outlined in *Burlington Industries*.

Turning to the elements of that defense, we conclude that no reasonable jury could fail to determine that PSB acted reasonably "to prevent and correct promptly any sexually harassing behavior." *Id.* at 2270. PSB offered essentially uncontradicted evidence that it had in place a comprehensive policy against sexual harassment.[6] While the existence of such a policy will not satisfy the first element of the defense in every case,

> where, as here, there is no evidence that an employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional, [its] existence ... militates strongly in favor of a conclusion that the employer exercised reasonable care to prevent and promptly correct sexual harassment.

Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999) (internal quotation marks omitted). Additionally, the policy provided that reports of sexual harassment were to be made to the human resources department, so that Watkins was not in the position of having to report Kelley's conduct to someone in his chain of command. *See Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999) (holding that employer had satisfied first element of affirmative defense as a matter of law based

[6]Watkins attempts to create an issue of fact concerning the existence of such a policy by contorting a brief passage from Fisher's deposition in which he demonstrated a failure to understand a question from Watkins' counsel. Despite Watkins' strenuous efforts, we rule that no reasonable fact finder could conclude, based on that passage, that PSB did not have an anti-harassment policy during Watkins' employment with PSB.

on existence of anti-harassment policy that, *inter alia*, allowed victims of harassment to circumvent the chain of command).

Moreover, there can be no dispute that PSB acted promptly upon learning of Watkins' allegations of sexual harassment. Immediately upon receiving Dowling's report in August,[10] Nicola went to Watkins and spoke with her personally; he then relayed the information he had received to Fisher. Fisher, in turn, conducted an investigation that involved speaking with Kelley and attempting to arrange a meeting with Watkins, which Watkins refused. This evidence further indicates that PSB took reasonable care to prevent and promptly correct incidents of sexual harassment.[11] *See Brown*, 184 F.3d at 396 (noting, in determining that first prong of affirmative defense was established as a matter of law, that "the existence of a viable anti-harassment policy ... [was] accompanied by other undisputed evidence of the employer's reasonable care," including prompt and supportive response to complaint of harassment even though the harassment was not reported under the employer's anti-harassment policy).

Watkins contends that PSB cannot satisfy its burden with respect to the first element of the defense because the record contains evi-

[10]Watkins' testimony that she told Dowling of the harassment in July, even if assumed to be true, is irrelevant to the question of whether PSB acted reasonably to prevent and promptly correct Kelley's sexual harassment of Watkins. Dowling testified without contradiction that she did not pass this information on to Nicola until August. Additionally, the record evidence establishes that Dowling, although titled a "site supervisor," had no responsibility to investigate allegations of sexual harassment and no authority to discipline employees; she merely oversaw the particular site to which she was assigned.

[11]The adequacy of PSB's response should be gauged in light of the conduct reported by Watkins. Watkins did not report to Dowling that she had been raped, but rather claimed only that Kelley had fondled her breasts and thrust his hand down her pants. PSB's response to the *reported* harassment—requiring Kelley to avoid all contact with Watkins—was reasonable and sufficient given that the company had already decided to terminate Kelley for other reasons and that Kelley was no longer exercising supervisory authority. Whether the same remedy would have been adequate to remedy Watkins' subsequent claim of rape is irrelevant.

dence that another PSB employee, Kia Odom, complained of harassment by Kelley prior to the time of Watkins' complaint. However, the evidence regarding Odom's complaint is scant at best, and what little evidence there is tends to support a conclusion that Odom made her allegations *after* Kelley raped Watkins.[12] Obviously, PSB cannot have failed to exercise reasonable care to prevent the harassment of Watkins by Kelley if it was unaware, prior to Kelley's rape of Watkins, that Kelley was a potential predator. *Cf. Brown*, 184 F.3d at 396 ("The law requires an employer to be reasonable, not clairvoyant or omnipotent."). More importantly, the record contains no evidence concerning the nature of Odom's allegations or PSB's response. The only relevant testimony was from Nicola, who stated that he responded to an inquiry from Fisher regarding the Odom matter. Far from bespeaking an indifference to allegations of sexual harassment, Nicola's testimony indicates that PSB in fact investigated Odom's complaint. Accordingly, we conclude that no reasonable jury could find, based on the mere scintilla of evidence in the record, that PSB's handling of the Odom matter denoted a failure to take reasonable care to prevent and promptly correct sexual harassment.

We also conclude that no reasonable jury could fail to find that PSB satisfied the second element of the affirmative defense. That element requires the employer to establish that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus.*, 118 S. Ct. at 2270.[13] When an employer has in place a viable anti-harassment policy, a demonstration that an employee unreasonably failed to utilize the complaint procedure provided by the employer "will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.* Simply put, "the law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists."

[12]For example, Dowling testified without contradiction that she learned of Odom's complaint one month before learning about Watkins' accusations; assuming Watkins first spoke to Dowling in July, Dowling would have spoken to Odom in June.

[13]PSB does not assert that Watkins failed to take appropriate action to avoid being attacked by Kelley.

Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1038 (7th Cir. 1998) (internal quotation marks omitted).

Here, there is no dispute that Watkins did not report the rape by Kelley pursuant to PSB's anti-harassment policy, which required that she contact the director of human resources.[14] And, while Watkins told Dowling that Kelley had fondled her breasts and placed his hands down her pants, she repeatedly expressed her unwillingness to pursue the matter. Watkins testified that her failure to report the incident promptly and fully resulted from embarrassment and fear of reprisal.[15] This evidence, however, is insufficient as a matter of law to establish that Watkins acted reasonably in failing to report Kelley according to the anti-harassment policy. *See Shaw*, 180 F.3d at 813 (holding that embarrassment and fear of retaliation do not justify failure to report harassment, reasoning that "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms").

[14]Of course, Watkins did contact PSB's human resources department in September. By that point, however, PSB had already acted on her allegations of misconduct on the basis of the informal report to Dowling.

[15]Watkins also testified that she received no training on the policy, did not receive a copy of the employee handbook containing the policy, and never observed the memorandum concerning the policy that was prominently placed in the conference room. Watkins' lack of knowledge does not establish the reasonableness of her failure to report the harassment pursuant to the policy. PSB took pains to make its employees aware of the policy by posting the memorandum prominently in an area frequented by all PSB employees and by placing copies of the employee handbook at each and every work site (indeed, Nicola personally placed new handbooks at the work sites because the older versions were worn). Under these circumstances, a reasonable jury could only conclude that Watkins was at least constructively aware of the policy. *Cf. Shaw*, 180 F.3d at 811 (holding that employee who disclaimed actual knowledge of anti-harassment policy was constructively aware of it when she signed a document acknowledging receipt of the employee handbook, which contained the policy).

Accordingly, we hold that no reasonable jury could have concluded that PSB failed to establish the second prong of the affirmative defense.[16]

In summary, we affirm the grant of judgment as a matter of law to PSB on Watkins' claim of sexual harassment. Although Watkins established the existence of a hostile environment, we conclude that no rational jury could have failed to find that PSB established the elements of the affirmative defense to liability set forth in *Burlington Industries*.

B.

Next, Watkins maintains that the district court improperly granted judgment as a matter of law to PSB on her retaliation claim. We disagree.

Claims of retaliation may properly be analyzed according to the burden-shifting proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). Under this scheme, a

[16]Even if Watkins' disclosure of the harassment to Dowling were adequate to establish that she took advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment—as PSB did here, *see supra* note 11—would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-66 (5th Cir. 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring specially) ("Under the framework established by the Court in *Faragher* and *Burlington Industries*, a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII in cases where [there has been no tangible employment action]."). Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation. *See Burlington Indus.*, 118 S. Ct. at 2270.

plaintiff must first allege a prima facie case of discrimination by demonstrating that "(1) she engaged in protected activity, (2) the employer took adverse action, and (3) there was a causal connection between the two." *Id.* The burden then shifts to the employer to articulate a legitimate, nonretaliatory reason for its action; if it succeeds in doing so, the burden shifts back to the employee to establish that the employer's asserted reason is pretextual. *See id.*

Here, Watkins certainly presented a prima facie case of retaliation: She informed Kelley that she had reported the harassment to the EEOC; she was terminated; and the temporal proximity of these two events provides evidence of a causal connection between them, *see Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) (noting that "very little evidence of a causal connection is required to establish a *prima facie* case" and that mere temporal proximity is sufficient to demonstrate causality). However, PSB offered a legitimate, nonretaliatory reason for her discharge: Watkins undisputedly left her post at Benet House, a disciplinary infraction subject to immediate termination. And, Watkins offered no evidence whatsoever that this reason was a mere pretext for retaliation. *See id.* at 444. We therefore affirm the grant of judgment as a matter of law on this claim.

III.

For the reasons set forth above, we conclude that the district court correctly granted judgment as a matter of law to PSB on Watkins' claims of sexual harassment and retaliation. Accordingly, we affirm.[17]

AFFIRMED

[17]In view of our affirmance of the grant of judgment as a matter of law, we need not consider whether the district court abused its discretion in granting the alternative motion for a new trial, nor need we address Watkins' appeal of the refusal of the district court to submit the issue of punitive damages to the jury.

Supreme Court, U.S.
FILED
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(2)

No. 99-1374

IN THE

Supreme Court of the United States

ANGEL WATKINS,

Petitioner,

v.

PROFESSIONAL SECURITY BUREAU, LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Professional Security Bureau, Limited, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner Angel Watkins filed this action against Respondent Professional Security Bureau, Limited ("PSB") on February 20, 1997 alleging sexual harassment in violation of 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) while employed at PSB as a result of a sexual assault. *Petitioner's Appendix at 1a-4a.* A jury trial commenced on August 31, 1998 and concluded with an Order of Judgment on September 4, 1998. *Petitioner's Appendix at 5a-9a.* Ms. Watkins presented claims of quid pro quo harassment, sexually hostile work environment, and retaliatory discharge. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.231-A.291.* No claim was asserted against the individual employee alleged to have assaulted Ms. Watkins.

PSB is a contract security guard provider. Ms. Watkins began employment with PSB as a security guard in August 1995. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.233.* Ms. Watkins claims she was the victim of a rape/sexual assault that occurred on May 24, 1996 by her PSB supervisor Edward Kelley at PSB's office in Lutherville, Maryland. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.242-A.248.* Ms. Watkins did not report the sexual assault to PSB until three months later. Moreover, the alleged rape was not reported to the police until September 16, 1996, four months after the claimed assault and following her termination from employment by PSB. No criminal charges were ever filed against Kelley by the local authorities. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.273-A.274.*

In August 1996 Ms. Watkins stated to co-worker Hazel Dowling that Edward Kelley had fondled her, Ms. Watkins did not advise that she was raped. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.17-A.18; A.280-A.281.*

At the time of the assault PSB had a written policy against sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.197.* Specifically, there was a written memorandum from PSB's President posted in the training room at PSB's office in Lutherville, Maryland. The memorandum stated that sexual harassment would not be tolerated. The memorandum provided a phone number to call in the event an employee believed they were subjected to sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.64-A.65; A.198; A.227-A.228.* Each PSB employee was provided with a company employment handbook. A copy of the handbook was also located at each PSB post. The employee handbook stated sexual harassment would not be tolerated and set forth the procedure for reporting complaints about sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.65-A.67; A.198; A.500.* Indeed, Ms. Watkins had prior experience filing claims with the EEOC regarding sexual hostile work environment with a prior employer. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.331.*

When Ms. Watkins reported being fondled by Kelley, per its policy PSB immediately instituted an investigation. Specifically, once Hazel Dowling advised PSB Supervisor Donald Nicola of the purported fondling, Nicola immediately traveled to where Ms. Watkins was working at the time and

interviewed Ms. Watkins about the incident. Again, Ms. Watkins only reported being fondled by Kelley. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.36-A.38; A.76.* After interviewing Ms. Watkins, Nicola prepared a report — *Respondent's Appendix at A.573* — and advised PSB Vice President of Operations Charles Fisher of the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.44; A.77.* Fisher immediately followed up by investigating the incident, and meeting with and interviewing Hazel Dowling regarding the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.* Fisher also interviewed Kelley by telephone who was out of the office on disability. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.222.* On August 15, 1996 Fisher received a second report from Nicola regarding Nicola's continued investigation of the incident in which Ms. Watkins indicated she did not wish to pursue the matter. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.574.* At that point, Fisher ceased his investigation because Ms. Watkins had not filed a complaint with PSB's Human Resources Department per the sexual harassment policy, Kelley was out on disability and no longer in a position to affect Ms. Watkins' employment or approach her in her employment, and a decision had already been made by PSB to terminate Kelley upon his return from disability leave for unrelated reasons. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.*

Ms. Watkins was terminated from employment with PSB on September 16, 1996 for reasons wholly unrelated to the incident that is the subject of this litigation. Ms. Watkins had previously been terminated in July of 1996 — before

advising anyone of the sexual assault — for poor performance and misconduct, which included arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.56; A.58; A.59-A.62; A.474-A.476; A.502.* Ms. Watkins was reinstated at Fisher's insistence before her complaint of sexual harassment. Fisher advised Nicola that Ms. Watkins be allowed to "straighten herself out" before being terminated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.37; A.58-A.59; A.216.* Edward Kelley played no role whatsoever in either decision to terminate or reinstate Ms. Watkins. *Appendix Below In the United States Court of Appeals for the Fourth Circuit Appendix at A.71-A.74.*

Ms. Watkins' second termination on September 16, 1996 was for continued and gross misconduct which led to PSB's loss of the account to where Ms. Watkins was assigned. *Appendix Below In the United States Court of Appeals for the Fourth Circuit A.86-A.91; A.216-A.217; A.228-A.229; A.504.* Nicola made the decision to terminate Ms. Watkins. It was approved by Fisher. Again, Kelley had no role in the termination of Ms. Watkins on September 16, 1996. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.91; A.228-A.230.* Specifically, Nicola testified:

> That Ms. Watkins had locked the keys, which has the master key to all the apartments in the building in the day room, which has the TV. Some of the people there said she was sleeping. She got up to walk out, the door closed behind you and locks and you can't get back in without a key. She left

> the building unguarded, unmanned, went down to the street to the handyman's house, tried to get him to open the door. When he refused to do it, she came back, called up the manager, 5:30, Six O'clock in the morning, saying that the maintenance man would not open the door for her. Because of this, we lost the site, and I terminated Angel.

Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.89. Fisher testified:

> The approval of the termination was based upon — she had deserted her post — well let me back-up on that for a second. In the first case, she was off her post in the facility, as there were keys that were assigned to her that were found in an area where could not have been in, so we knew that she had already been off post in the facility, i.e. TV room.
>
> Secondly, she left the — she walked out of the TV room and left the keys, and the reason we know that is because she had to leave the property to get someone else to let her in to get her keys back. These keys were used to access the emergency areas, let people in and out of the building. Based on, first the keys being found in the TV room, showing that she had been present in an area she shouldn't have been; and secondly, the fact that she had gone up to someone else's home off property showing she left the property which was leaving post, I made the decision to terminate her.

Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.228-A.229.

At the close of Ms. Watkins' case, PSB moved for a directed verdict. PSB's motion was denied. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.322-A.325.* PSB moved again for a directed verdict following presentation of its defense. This motion was also denied. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.374.* Thereafter the jury was charged as to each of the separate claims, quid pro quo harassment, hostile work environment, and retaliatory discharge, as well as the affirmative defenses. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.403-A.407.*

On September 3, 1998 the jury found for PSB on the issue of quid pro quo sexual harassment. The jury found for Ms. Watkins on the issue of hostile work environment and retaliatory discharge. A hearing was held the following day on September 4, 1998 on whether the jury would consider punitive damages. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.416-A.443.* Prior to trial PSB moved *in limine*, in part, to dismiss Ms. Watkins claim for punitive damages. The court reserved its decision on this issue pending evidence presented at trial. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.4, 8/31/98 Docket Minute Entry.* At the September 4, 1998 hearing the court ruled that punitive damages would not be considered by the jury because there was no evidence from which the jury could reasonably conclude that PSB acted with malice or with reckless indifference with respect to Ms. Watkins. *Petitioner's Appendix at 5a-8a.* The court found as a matter of irrefutable

fact that PSB had a written policy since 1991 or 1992 set forth in an employee handbook received by all employees which stated that sexual harassment of any kind would not be tolerated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.439.* Once Ms. Watkins reported that she had been fondled by Kelley, PSB officials investigated and advised Kelley to have no further contact and to stay away from Ms. Watkins. Moreover, Kelley's act — although reprehensible — did not reflect a continuum of conduct by PSB. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441.*

Following the trial PSB timely filed a written motion for judgment as a matter of law, or in the alternative, for a new trial. *Petitioner's Appendix at 10a.* In a memorandum opinion dated October 22, 1998, the district court granted PSB's motion for judgment as a matter of law or, in the alternative, for a new trial. *Petitioner's Appendix at 28a-34a.* As to the sexually hostile work environment claim, the district court found that based upon the evidence presented at trial, a reasonable jury could only conclude that PSB satisfied the affirmative defense — as set forth in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) — to such a claim, thus PSB was entitled to judgment as a matter of law. *Petitioner's Appendix at 29a-31a.* The district court concluded that although there was sufficient evidence for the jury to conclude Ms. Watkins was subject to a sexually hostile work environment, the overwhelming evidence indicated PSB took reasonable care to prevent and promptly correct Kelley's alleged behavior and that Ms. Watkins failed to take advantage of PSB's established policy on sexual harassment. Accordingly, the district court could not uphold the jury's rejection of PSB's affirmative defense. *Petitioner's Appendix at 30a.*

> In light of the undisputed evidence, the only reasonable conclusion that the jury could reach in this case is that Professional Security exercised reasonable care to prevent and promptly correct the sexually harassing behavior and that Watkins, by not complaining to anyone at Professional Security about the harassment until August 1996, unreasonably failed to take advantage of any preventive or corrective opportunities provided by Professional Security or to avoid harm otherwise. Hence, Professional Security must prevail against Watkins on the affirmative defense to the claim of sexually hostile work environment as a matter of law.

Petitioner's Appendix at 31a.

As to the retaliation claim, the district court found that Ms. Watkins failed to present sufficient evidence from which a reasonable jury could have concluded that the third requisite for a retaliatory discharge had been met, thus entitling PSB to judgment as a matter of law on this claim. *Petitioner's Appendix at 31a-33a.* The district court concluded that although Ms. Watkins presented sufficient evidence from which a reasonable jury could conclude the first two prongs were met — that Ms. Watkins was engaged in a protected activity and that she suffered an adverse employment action against her — there was insufficient evidence for a reasonable jury to have inferred a causal connection between her complaining about the harassing conduct by Kelley and the termination of her employment by PSB. *Petitioner's Appendix at 31a-32a.* Moreover, the district court concluded that even if it were assumed Ms. Watkins presented sufficient evidence on a causal connection, PSB articulated legitimate

non-retaliatory reasons for her termination and that Ms. Watkins failed to offer sufficient evidence that PSB's reasons for the termination were pre-textual. *Petitioner's Appendix at 31a-32a.*

The district court also granted PSB's motion for a new trial in the alternative. *Petitioner's Appendix at 34a.*

Plaintiff appealed the decision of the district court (1) for judgment in favor of PSB notwithstanding the verdict on the issues of PSB's liability for (a) the sexually hostile work environment and (b) retaliatory discharge, (2) dismissal of plaintiff's punitive damages claim, and (3) the alternative relief granting PSB a new trial to the United States Court of Appeals for the Fourth Circuit. In a opinion dated November 15, 1999 the United States Court of Appeals for the Fourth Circuit upheld the ruling of the district court. *Petitioner's Appendix at 35a-37a.* Specifically, the Fourth Circuit held that no reasonable jury could have failed to find that PSB raised and satisfied the affirmative defense — set forth in *Ellerth v Burlington Indus., Inc., supra,* 118 S. Ct. 2257 (1998) — to Ms. Watkins claim of sexual harassment. *Petitioner's Appendix at 43a-46a.* Moreover, with respect to the retaliation claim, the Fourth Circuit held that Ms. Watkins failed to offer any evidence whatsoever that the reason for her ultimate termination by PSB was a mere pretext. *Petitioner's Appendix at 46a-47a.*

SUMMARY OF ARGUMENT

In accordance with this Court's opinions in *Burlington Industries, supra,* and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998), The United States Court of Appeals for the Fourth Circuit correctly affirmed the district court's

ruling dismissing Petitioner's sexually hostile work environment, retaliatory discharge, and punitive damage claims. The overwhelming evidence was that PSB exercised reasonable care to prevent and promptly correct the alleged sexually harassing behavior in the workplace, and that Ms. Watkins failed to take advantage of the preventive opportunities offered by PSB.

As to the retaliatory discharge claim, the evidence overwhelmingly shows that PSB set forth legitimate and non-retaliatory reasons for Mrs Watkins' termination, and Ms. Watkins failed to offer any evidence in support of her argument that PSB's reasons for her termination were pre-textual.

Petitioner's punitive damages claim was properly dismissed as Petitioner's substantive claims were dismissed as a matter of law. Moreover, there was no evidence whatsoever of any malice or recklessness on the part of PSB.

REASONS FOR DENYING THE WRIT

I. PSB WAS ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE TO A HOSTILE WORK ENVIRONMENT CLAIM

Petitioner contends in the first point of her Petition for Certiorari that the affirmative defense available to a corporate defendant in a sexually hostile work environment case as set forth in *Burlington Industries*, *supra*, is *not* available where adverse employment action is shown. Petitioner argues that the district court and the United States Court of Appeals for the Fourth Circuit erred in allowing PSB to assert this defense notwithstanding the fact that the adverse employment

action taken against Ms. Watkins was wholly unrelated to the protected activity, i.e., reporting of sexual harassment. This Court, however, has made it unmistakably clear that the affirmative defense set forth in *Burlington Industries* may be asserted by an employer provided there was no adverse employment action taken against the employee that was causally connected to the protected activity of reporting a sexually hostile work environment.

In *Burlington Industries* this Court established a distinction between cases in which tangible employment action was taken against an employee for failure to submit to a supervisor's sexual demands, and those in which no such action was taken. *Burlington Industries*, 118 S. Ct. at 2265. This Court ruled that where tangible adverse employment action is taken that *is* causally related to the protected activity, i.e., complaining of sexual harassment, the employer will be automatically vicariously liable for the actions of its employee. Where, however, no tangible employment action — or tangible employment action wholly unrelated to protected activity — is taken against the complaining employee, the employer may raise the affirmative defense to liability. *Burlington Industries*, 118 S. Ct. at 2270.

Ms. Watkins argued below and in this Petition for Certification that her termination on September 16, 1996 was "adverse employment action", and accordingly PSB is barred from asserting the affirmative defense set forth in *Burlington Industries*. Certainly, termination may constitute adverse employment action. Ms. Watkins, however, as noted by the Fourth Circuit, failed to set forth any evidence whatsoever that her termination resulted from her engaging in the protected activity of reporting a claim of sexual harassment or that it "resulted from a refusal to submit to a supervisor's

sexual demands." *Petitioner's Appendix at 42a*. No evidence was presented that her termination was based on any grounds other than those expressed by PSB — leaving her post — at the time she was terminated. The Fourth Circuit aptly noted that record below clearly evidenced Ms. Watkins' termination was the result of a bona fide non-discriminatory purpose. Ms. Watkins had previously been fired for failure to adhere to company policy and protocol, however, she was re-hired and given a second chance. Both the initial termination and rehire preceded the complaint of sexual harassment. Ms. Watkins' subsequent termination on September 16, 1996 came as a result of additional flagrant violations of company protocol and policy which also resulted in the loss of the account/client to which Ms. Watkins was assigned. Accordingly, the district court and the Fourth Circuit Court of Appeals found that PSB has satisfied its burden of proof as a matter of law as to the affirmative defense.

Under the position advocated by Petitioner, an employee who engages in protected activity, such as complaining about sexual harassment, would then have *carte blanche* authority to disregard any and all policy or protocol of the employer without fear of any adverse action or reprisal by their employer, including bona fide discipline or termination. An employee engaged in the protected activity of reporting a sexual harassment would be free to disregard all job duties, but nonetheless be immune from any reprimand by the employer. Such a result is wholly inappropriate from a public policy standpoint and subjects this employer and co-workers to unmitigated harm from such a "protected" employee. Clearly, this was not the intent of this Court in *Burlington Industries* in enunciating the affirmative defense available to employers in claims alleging sexually hostile work

environment. The resulting disorder that would reign in workplaces from such a policy is apparent and none of the objectives for permitting the defense are served by such a limitation.

II. PSB ESTABLISHED ALL THE ELEMENTS OF THE AFFIRMATIVE DEFENSE TO LIABILITY SET FORTH IN BURLINGTON INDUSTRIES

Petitioner contends in the second point of her Petition for Certiorari that even though the affirmative defense as set forth in *Burlington Industries* may have been available to PSB, the district court and the United States Court of Appeals for the Fourth Circuit improperly ruled that no reasonably jury could conclude that the elements of the defense had not been established by PSB. Petitioner argues that the second element of the defense — that the plaintiff unreasonably failed to take advantage of any preventive or corrective action opportunities provided by the employer or to avoid harm otherwise — was not met.

Not only did the courts below correctly find that PSB was permitted to assert the affirmative defense set forth in *Burlington Industries*, they correctly held that no reasonable jury could find that the necessary elements for succeeding on the defense had not been met.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective action opportunities

> provided by the employer or to avoid harm otherwise.

Burlington Industries, 118 S. Ct. at 2270.

The district court in this matter found that based upon the evidence presented at trial a jury could have reasonably concluded that Ms. Watkins was subjected to a sexually hostile work environment. Ms. Watkins testified that Kelley raped her in the PSB offices. Although Ms. Watkins failed to report the assault when it occurred, and even when she did three months later only stated Kelley had fondled her, no evidence was offered directly challenging her testimony on this issue. Accordingly, PSB did not, and does not now, contest the fact that the jury could have concluded that Ms. Watkins was subjected to a sexually hostile work environment.

The irrefutable evidence below, however, and as recognized by the Fourth Circuit and the district court, overwhelmingly demonstrates that PSB exercised reasonable care to prevent and correct promptly Kelley's sexually harassing behavior, and that Ms. Watkins unreasonably failed to take advantage of the preventive or corrective action opportunities provided by PSB. Relying on the affirmative defense set forth by this Court in both *Burlington Industries* and *Faragher*, the Fourth Circuit was required to affirm the district court's opinion finding PSB not vicariously liable for the sexually hostile work environment to which a jury could have, and indeed did, find plaintiff was subject to while employed by PSB.

As noted by the Fourth Circuit, PSB presented overwhelming evidence satisfying the first requisite of the

affirmative defense — that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior. *Petitioner's Appendix at 42a-43a.* It is irrefutable that at the time of the assault, indeed at all relevant times, PSB had a written policy against sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.197.* There was a written company memorandum posted in the training room at PSB's office in Lutherville, Maryland stating that sexual harassment would not be tolerated. There also was a company employment handbook stating sexual harassment would not be tolerated. Although Ms. Watkins asserts she was never personally provided with a handbook — PSB asserts she was — it is uncontested that a copy of the handbook was at each post, including those where Ms. Watkins worked. Both the company memorandum and the handbook set forth the procedure for reporting complaints about sexual harassment, and provided the telephone "hot line" number to contact. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.65-A.67; A.198; A.500.*

When Ms. Watkins reported being fondled by Kelley, PSB immediately took steps to prevent and promptly correct any further harassing behavior. PSB immediately investigated the incident. Once Donald Nicola was advised by Hazel Dowling of the purported fondling, Nicola immediately traveled to where plaintiff was working at the time and interviewed her about the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.36-A.38; A.76.* Nicola then prepared a report and forwarded it up the chain of command to PSB Vice President of Operations Charles Fisher of the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.44; A.77; A.573.* Once advised of the occurrence, Fisher

immediately began investigating the incident by meeting with and interviewing Hazel Dowling, and Kelley. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220;* A.222. Fisher eventually concluded the matter based upon: (1) receipt of a second report from Nicola stating that plaintiff advised she did not wish to pursue the matter; (2) plaintiff's failure to file a complaint with PSB's Human Resources Department per the written sexual harassment policy; (3) Kelley being out on disability and no longer in a position to affect plaintiff's employment or approach her in her employment capacity in any way; and (4) the fact that PSB had already made a decision to terminate Kelley for unrelated reasons. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.* It must be noted that at this time Ms. Watkins had stilled fail to advise anyone that she had been raped.

Petitioner sought to raise a claim that there had been prior complaint against Kelley by PSB employee Kia Odom. As pointed out by the United States Court of Appeals for the Fourth Circuit, however, the evidence revealed that Ms. Odom's complaint was made subsequent to the date Ms. Watkins claims she was assaulted. Moreover, once PSB became aware of Ms. Odom's complaint it exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

> However, the evidence regarding Odom's complaint is scant at best, and what little evidence there is tends to support a conclusion that Odom made her allegations *after* Kelley raped Watkins. Obviously, PSB cannot have failed to exercise reasonable care to prevent harassment of Watkins by Kelley if it was unaware, prior to Kelley's rape

> of Watkins, that Kelley was a potential predator. *Cf. Brown*, 184 F.3d at 396 ("The law requires an employer to be reasonable, not clairvoyant or omnipotent."). More importantly, the record contains no evidence concerning the nature of Odom's allegations or PSB's response. The only relevant testimony was from Nicola, who stated that he responded to an inquiry from Fisher regarding the Odom matter. Far from bespeaking an indifference to allegations of sexual harassment, Nicola's testimony indicates PSB in fact investigated Odom's complaint. Accordingly, we conclude that no reasonable jury could find, based on the mere scintilla of evidence in the record, that PSB's handling of the Odom matter denoted a failure to take reasonable care to prevent and promptly correct sexual harassment.

Petitioner's Appendix at 44a (Footnote omitted).

Based on the foregoing the Fourth Circuit correctly held that PSB satisfied the first element of the affirmative defense to a claim of a sexually hostile work environment.

It is similarly uncontroverted that no reasonable jury could conclude that the second element of the affirmative defense — failure to take advantage of the preventive and corrective opportunities provided by PSB — was not established by PSB. Addressing the second prong of an employer's affirmative defense, this Court in *Burlington Industries* and *Faragher* stated:

> While proof that an employer had promulgated an anti-harassment policy with

> complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. *And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such a failure will normally suffice to satisfy the employer's burden under the second element of the defense.*

Burlington Industries, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-2293. (Emphasis added.)

As previously set forth PSB had a sexual harassment complaint procedure in place when Ms. Watkins alleges Kelley assaulted her. Moreover, Ms. Watkins failed to avail herself of the complaint procedure. She did not report the assault at the time it happened; rather, she waited approximately three months. When she finally advised of the occurrence, she did not report what she later claimed occurred. Moreover, Ms. Watkins did not follow the procedure as outlined in the Company memorandum or the employee handbook. The Fourth Circuit correctly held that based upon the foregoing, no reasonable jury could conclude other than that Ms. Watkins failed to take advantage of the preventive and corrective opportunities provided by PSB. *Petitioner's Appendix at 44a-46a.*

> Here, there is no dispute that Watkins did not report the rape by Kelley pursuant to PSB's anti-

> harassment policy, which required that she contact the director of human resources. And, while Watkins told Dowling that Kelley had fondled her breasts and placed his hands down her pants, she repeatedly expressed her unwillingness to pursue the matter. Watkins testified that her failure to report the incident promptly and fully resulted from embarrassment and fear of reprisal. This evidence, however, is insufficient as a matter of law to establish that Watkins acted reasonably in failing to report Kelley according to the anti-harassment policy. *See Shaw*, 180 F.3d at 813 (holding that embarrassment and fear of retaliation do not justify failure to report harassment, reasoning that "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms"]. Accordingly, we hold that no reasonable jury could have concluded that PSB failed to establish the second prong of the affirmative defense.

Petitioner's Appendix at 45a-46a. (Footnotes omitted).

A footnote to the Fourth Circuit opinion aptly noted that even if Watkins' reporting of the harassment to Dowling were sufficient to establish that she took advantage of preventative opportunities, the result — PSB satisfying the affirmative defense — would be the same.

> Even if Watkins' disclosure of the harassment to Dowling were adequate to establish that she took

> advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment — as PSB did here, *see supra* note 11 — would be held liable for harassment on the basis of an inability to satisfy literal terms of the second element of the affirmative defense. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-266 (5th Cir. 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring specially) ("under the framework established by the Court in *Faragher* and *Burlington Industries*, a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII in cases where [there has been no tangible employment action]."). Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in Burlington Industries: to promote conciliation. *See Burlington Indus.*, 118 S. Ct. at 2270.

Based on the foregoing, the Fourth Circuit correctly held that PSB satisfied the second element of the affirmative defense to a claim of a sexually hostile work environment, and in favor of PSB on issue of PSB's liability on the claim of a sexually hostile work environment.

III. PSB UNEQUIVOCALLY EVIDENCED A LEGITIMATE NON-RETALIATORY REASON FOR ITS TERMINATION OF PETITIONER

The Fourth Circuit correctly affirmed the district court's granting PSB judgment as a matter of law on Ms. Watkins' retaliatory discharge claim. PSB offered a legitimate non-retaliatory reason for Ms. Watkins' ultimate discharge. Ms. Watkins was thereafter unable to offer any evidence whatsoever that the reasons set forth by PSB for her termination were a mere pretext for retaliation against her for complaining of sexual harassment.

In order to establish a prima facie case of retaliatory termination, a plaintiff must prove: (1) that she engaged in protected activity; (2) that the employer took adverse employment action against her; and (3) a causal connection existed between the protected activity and the adverse action. Once a plaintiff has evidenced these elements, the burden then shifts to the employer to establish a legitimate non-retaliatory reason for the adverse employment action taken against plaintiff. Once a non-retaliatory reason for the adverse employment action is demonstrated, the burden then shifts back to the plaintiff to evidence that the reason or reasons set forth by the employer were a mere pretext for retaliation. *See e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998).

PSB does not dispute that Ms. Watkins established a prima facie case of retaliation. Critical to this claim, however, and as held by the Fourth Circuit, is that Ms. Watkins failed to carry her burden of proof once PSB evidenced a legitimate

non-retaliatory basis for her termination. Specifically, Ms. Watkins failed to set forth any evidence whatsoever that the reasons set forth by PSB were a mere pretext for retaliating against her for complaining of sexual harassment. *Petitioner's Appendix at 46a-47a.*

PSB presented evidence at trial that unequivocally established that Ms. Watkins was terminated on September 16, 1996 because of poor job performance. Ms. Watkins was previously terminated in July 1996 for similar poor performance. Even if it were assumed that Ms. Watkins presented sufficient evidence from which a jury could have concluded a causal connection did exist between her complaining of sexual harassment and her termination on September 16, 1996,[1] PSB set forth legitimate, non-retaliatory reasons for her termination.

Ms. Watkins was initially terminated in July of 1996 for misconduct. The misconduct included arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.56; A.59-A.62; A.474-A.476; A.502.* Ms. Watkins was terminated in September 16, 1996 for gross misconduct. Misconduct, which was clearly articulated in the employee manual and directly resulted in PSB loosing the account to which plaintiff was assigned. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.86-A.91; A.216-A.217; A.228-A.229; A.504.* Ms. Watkins was terminated for

1. The district court arguably found that Ms. Watkins did not evidence a causal connection between her reporting of the harassment and her ultimate firing. *See Petitioner's Appendix at 32a.*

locking the master set of keys for the elderly housing residence to which she was assigned in the TV room of the residence. Although plaintiff was not supposed to be in the room, it was reported that she had fallen asleep in the room. She then left the residence unguarded and went to the handyman's home to try and get him to open the room for the keys. Eventually the manager of the premises had to be called at 5:30 a.m. to unlock the room in which Ms. Watkins had left her keys. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441;A.89; A.228-A.229.* Under PSB's written employment policy, it was mandatory that employees who leave their post without permission be terminated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A. 229-230; A.488.* Ms. Watkins previous termination in July, 1996 was for poor performance at the same site, including arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.56; A.59-A.62; A.474-A.476; A.502.*

Ms. Watkins failed to set forth any evidence that PSB's termination of her in 1996 was based in any way on her complaint against Kelley. Her complaints to the police and EEOC followed her termination. Accordingly, the Fourth Circuit affirmed the district court's judgment as a matter of law for PSB on Ms. Watkins' retaliatory discharge claim notwithstanding the jury's verdict.

IV. PETITIONER'S PUNITIVE DAMAGES CLAIM WAS PROPERLY DISMISSED AS A MATTER OF LAW

Applying the analysis set forth in *Kolstad v. American Dental Association*, 527 U.S. 576 (1999), the district court properly dismissed Ms. Watkins' punitive damages claim as a matter of law and did not submit it to the jury. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.437-A.441.* The Fourth Circuit correctly affirmed the district court's dismissal of the punitive damages claim given the dismissal of Ms. Watkins' substantive claims. *Petitioner's Appendix at 47a Fn.17.* PSB was entitled to judgment as a matter of law on the substantive claims rendering Ms. Watkins' punitive damages claim moot. The record is devoid of any evidence to infer reckless indifference or malice.

CONCLUSION

Based on the foregoing, this case does not merit further review by this Court and Ms. Watkins' Petition should be denied.

Respectfully submitted,

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